DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-1217
Title: Mike Stanton, Petitioner
v.
Drendolyn Sims
Docketed: April 10, 2013
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (11-55401)
Decision Date: January 16, 2013

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Apr 5 2013	Petition for a writ of certiorari filed. (Response due May 10, 2013)
May 21 2013	DISTRIBUTED for Conference of June 6, 2013.
May 28 2013	Response Requested . (Due June 27, 2013)
Jun 20 2013	Order extending time to file response to petition to and including July 29, 2013.
Jul 22 2013	Brief of respondent Drendolyn Sims in opposition filed.
Jul 22 2013	Motion for leave to proceed in forma pauperis filed by respondent Drendolyn Sims.
Aug 6 2013	Reply of petitioner Mike Stanton filed.
Aug 7 2013	DISTRIBUTED for Conference of September 30, 2013.
Oct 7 2013	DISTRIBUTED for Conference of October 11, 2013.
Oct 15 2013	DISTRIBUTED for Conference of October 18, 2013.
Oct 28 2013	DISTRIBUTED for Conference of November 1, 2013.
Nov 4 2013	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Nov 4 2013	Judgment REVERSED and case REMANDED. Opinion per curiam. (Detached Opinion)
Dec 6 2013	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

12 No. 1217

APR 5 - 2013
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MIKE STANTON,

Petitioner,

vs.

DRENDOLYN SIMS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

TIMOTHY T. COATES
Counsel of Record
LILLIE HSU
GREINES, MARTIN, STEIN & RICHLAND LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261
E-Mail: tcoates@gmsr.com

PETER J. FERGUSON
FERGUSON, PRAET & SHERMAN
1631 East 18th Street
Santa Ana, California 92705-7101
Telephone: (714) 953-5300
Facsimile: (714) 953-1143

Counsel for Petitioner Mike Stanton

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

In *United States v. Santana*, 427 U.S. 38, 42-43 (1976), this Court held that when police officers initiate a lawful arrest in public and the suspect flees to a private residence, the officers may pursue the suspect into the residence without a warrant to complete the arrest. The Court reasoned that "a suspect may not defeat an arrest . . . set in motion in a public place . . . by the expedient of escaping to a private place." *Id.* at 43. *Santana* involved a felony suspect. *See id.* at 41; *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984).

The questions presented are:

1. Does the "hot pursuit" doctrine articulated in *Santana* apply where police officers seek to arrest a fleeing suspect for a misdemeanor?

2. Is a police officer entitled to qualified immunity where he pursued a suspect fleeing the officer's attempt to arrest him for a jailable misdemeanor committed in the officer's presence, into the front yard of a residence through a gate used to access the front door, and the officer had reason to believe the suspect might have been just involved in a fight involving weapons?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

- Drendolyn Sims, plaintiff, appellant below, and respondent here.
- Mike Stanton, defendant, appellee below, and petitioner here.

No corporations are involved in this proceeding.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE	1
STATEMENT OF THE CASE	3
A. The Pursuit Into Plaintiff's Front Yard	3
B. Plaintiff's Front Yard And Entryway	4
C. The Lawsuit And Appeal	5
REASONS TO GRANT THE PETITION	7
I. REVIEW IS NECESSARY TO RESOLVE A CONFLICT AMONG STATE AND FEDERAL COURTS AT EVERY LEVEL CONCERNING WHETHER "HOT PURSUIT" OF A FLEEING SUSPECT, IN AND OF ITSELF, ALLOWS POLICE OFFICERS TO ENTER A HOME WITHOUT A WARRANT TO ARREST FOR A MISDEMEANOR	13
A. In *United States v. Santana*, This Court Held That "Hot Pursuit" Of A Fleeing Suspect Independently Justifies A Warrantless Home Entry, Because A Suspect May Not Frustrate An Arrest Begun In A Public Place By Fleeing To A Residence	13

TABLE OF CONTENTS – Continued

Page

B. *Welsh v. Wisconsin* Creates Ambiguity As To Whether Hot Pursuit, In And Of Itself, Justifies A Warrantless Home Entry To Effect An Arrest For A Misdemeanor 15

C. Federal And State Courts Are Divided On Whether Hot Pursuit Of A Fleeing Misdemeanant, In And Of Itself, Justifies A Warrantless Home Entry 20

1. The Sixth Circuit, Numerous District Courts And 14 State Courts Have Held That Hot Pursuit, In And Of Itself, Justifies A Warrantless Home Entry To Arrest For A Misdemeanor 20

2. The Ninth And Tenth Circuits, Several District Courts And The Courts Of Seven States Have Held That Hot Pursuit, In And Of Itself, Cannot Justify Warrantless Entry Into A Home To Arrest For A Misdemeanor 25

D. Review Is Necessary to Resolve The Ongoing Conflict Among The Courts And Clarify Whether Hot Pursuit, In And Of Itself, Justifies Warrantless Entry Into A Home To Arrest For A Misdemeanor 28

TABLE OF CONTENTS – Continued

Page

II. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S DENIAL OF QUALIFIED IMMUNITY CONTRAVENES THIS COURT'S PRECEDENTS AND IT IS NECESSARY TO RESOLVE THE CONFLICT AMONG APPELLATE COURTS CONCERNING APPLICATION OF QUALIFIED IMMUNITY WHERE OFFICERS ENTER A RESIDENCE IN HOT PURSUIT OF A FLEEING MISDEMEANANT 32

1. The Law Concerning Application Of *Santana*'s Hot Pursuit Doctrine To Misdemeanors Is Not Clearly Established, And It Is Necessary To Resolve The Conflict Among Appellate Courts Concerning Application Of Qualified Immunity In Such Cases 33

2. The Law Concerning An Officer's Ability To Enter Portions Of The Curtilage Used To Access A Residence In Order To Effect An Arrest For A Jailable Offense Was Not Clearly Established At The Time Of The Incident 37

CONCLUSION 42

TABLE OF CONTENTS – Continued

Page

APPENDIX

Order denying rehearing and amended opinion, United States Court of Appeals for the Ninth Circuit, filed January 16, 2013 ..... App. 1

Opinion, United States Court of Appeals for the Ninth Circuit, filed December 3, 2012 ..... App. 24

Order granting defendant's motion for summary judgment, United States District Court, Southern District of California, filed February 8, 2011 ..... App. 45

Photograph of gate to plaintiff's apartment unit, Exhibit 5 to declaration of Peter J. Ferguson in support of defendant's motion for summary judgment, filed November 22, 2010 ..... App. 70

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Anderson v. Creighton, 483 U.S. 635 (1987).....10, 32

Aragon v. City of Albuquerque, 423 F.App'x 790 (10th Cir. 2011).....26

Ashcroft v. al-Kidd, 131 S. Ct. 2074 (2011) 10, 12, 32

Bash v. Patrick, 608 F. Supp. 2d 1285 (M.D. Ala. 2009) 30

Brosseau v. Haugen, 543 U.S. 194 (2004).....12, 32

California v. Ciraolo, 476 U.S. 207 (1986).....39, 40

Cooper v. Smith, No. CIV.A. 905CV157, 2007 WL 339174 (E.D. Tex. Jan. 31, 2007).....21

Croal v. United Healthcare of Wisconsin, Inc., No. 07-CV-837, 2009 WL 913641 (E.D. Wis. Mar. 31, 2009) 27

Florida v. Jardines, No. 11-564, 2013 WL 1196577, ___ U.S. ___ (Mar. 26, 2013).....40

Garcia v. City of Imperial, No. 08CV2357 BTM PCL, 2010 WL 3834020 (S.D. Cal. Sept. 28, 2010).....30, 35

Garcia v. City of St. Paul, No. CIV.0983 (JNE/AJB), 2010 WL 1904917 (D. Minn. May 10, 2010).....30

Greiner v. City of Champlin, 27 F.3d 1346 (8th Cir. 1994).....29

Griffin v. City of Clanton, 932 F. Supp. 1359 (M.D. Ala. 1996) 21

TABLE OF AUTHORITIES – Continued

Page

Hameline v. Wright, No. 1:07-CV-69, 2008 WL 2696920 (W.D. Mich. June 30, 2008).....27

Haupricht v. Contrada, No. 3:08CV2961, 2009 WL 5061762 (N.D. Ohio Dec. 15, 2009).....21

Joyce v. Town of Tewksbury, 112 F.3d 19 (1st Cir. 1997).....29

Kentucky v. King, 131 S. Ct. 1849 (2011).....15

Knowles v. City of Benicia, 785 F. Supp. 2d 936 (E.D. Cal. 2011).....27

Kolesnikov v. Sacramento County, No. CIVS-06-2155 RRB EFB, 2008 WL 1806193 (E.D. Cal. Apr. 22, 2008).....26, 30, 35

Lockett v. City of Akron, 714 F. Supp. 2d 823 (N.D. Ohio 2010).....21

Mascorro v. Billings, 656 F.3d 1198 (10th Cir. 2011).....25, 269, 36

Messerschmidt v. Millender, 132 S. Ct. 1235 (2012).....12

Michigan v. Tyler, 436 U.S. 499 (1978).....16

Oliver v. United States, 466 U.S. 170 (1984).....7, 39

Payne v. City of Olive Branch, 130 F.App'x 656 (5th Cir. 2005).....29

Payton v. New York, 445 U.S. 573 (1980)....14, 15, 16, 18

Ryburn v. Huff, 132 S. Ct. 987 (2012).....12, 32, 33

Safford Unified Sch. Dist. v. Redding, 557 U.S. 364 (2009).....12, 34

TABLE OF AUTHORITIES – Continued

Page

Schmerber v. California, 384 U.S. 757 (1966) 16

Sero v. City of Waterloo, No. C08-2028, 2009 WL 2475066 (N.D. Iowa Aug. 11, 2009) 27

Smith v. City of Sturgis, No. 1:11-CV-390, 2012 WL 3010939 (W.D. Mich. Jul. 23, 2012).....26

St. Laurent v. Town of Sturbridge, No. CIV.A. 89-30005-F, 1990 WL 92470 (D. Mass. June 18, 1990) 21

Steagald v. United States, 451 U.S. 204 (1981).....14

United States v. Garcia, 997 F.2d 1273 (9th Cir. 1993) 38

United States v. Johnson, 256 F.3d 895 (9th Cir. 2001) 11, 34, 35, 40

United States v. Johnson, 106 F.App'x 363 (6th Cir. 2004) 20

United States v. Magana, 512 F.2d 1169 (9th Cir. 1975) 37

United States v. Roberts, 747 F.2d 537 (9th Cir. 1984) 37

United States v. Santana, 427 U.S. 38 (1976) .....*passim*

Warden v. Hayden, 387 U.S. 294 (1967) 14, 20

Welsh v. Wisconsin, 466 U.S. 740 (1984).....*passim*

TABLE OF AUTHORITIES – Continued

Page

STATE CASES

Brock v. State, 396 S.E.2d 785 (Ga.Ct.App. 1990) 23

Butler v. State, 829 S.W.2d 412 (Ark. 1992) 27

City of Kirksville v. Guffey, 740 S.W.2d 227 (Miss.Ct.App. 1987) 24

City of Middletown v. Flinchum, 765 N.E.2d 330 (Ohio 2002) 22

Commonwealth v. Curry, Nos. 91-429, 430 & 431, 1992 WL 884417 (Va.Cir.Ct. Jan. 6, 1992) 28

Edwards v. United States, 364 A.2d 1209 (D.C. 1976) 24

Gasset v. State, 490 So. 2d 97 (Fla.Dist.Ct.App. 1986) 21

Goines v. James, 433 S.E.2d 572 (W.Va. 1993) 29

LaHaye v. State, 1 S.W.3d 149 (Tex.Ct.App. 2000) 23

In re Lavoyne M., 270 Cal. Rptr. 394 (Cal.Ct.App. 1990) 21, 35

In re M.M., 278 P.3d 1221 (Cal. 2012) 4

Lepard v. State, 542 N.E.2d 1347 (Ind.Ct.App. 1989) 23

Lorenzana v. Superior Court, 511 P.2d 33 (Cal. 1973) 38

People v. Chavez, 75 Cal. Rptr. 3d 376 (Cal.Ct.App. 2008) 38

TABLE OF AUTHORITIES – Continued

Page

People v. Edelbacher, 766 P.2d 1 (Cal. 1989) 38

People v. Lloyd, 265 Cal. Rptr. 422 (Cal.Ct.App. 1989) 21, 35

People v. Sanders, 59 Ill. App. 3d 6, 16 Ill. Dec. 437, 374 N.E.2d 1315 (1978) 17

People v. Strelow, 96 Mich. App. 182, 292 N.W.2d 517 (1980) 17

People v. Thompson, 270 Cal. Rptr. 863 (Cal.Ct.App. 1990) 38

People v. Wear, 893 N.E.2d 631 (Ill. 2008) 23

State v. Alvarez, 31 So. 3d 1022 (La. 2010) 22

State v. Bell, 28 So. 3d 502 (La.Ct.App. 2009) 22

State v. Bennett, 295 N.W.2d 5 (S.D. 1980) 17

State v. Bessette, 21 P.3d 318 (Wash.Ct.App. 2001) 27

State v. Bolte, 560 A.2d 644 (N.J. 1989) 27

State v. Dugan, 276 P.3d 819 (Kan.Ct.App. 2012) 27

State v. Greer, No. C.R. 0604013367, 2007 WL 442228 (Del.Com.Pl. Feb. 6, 2007) 28

State v. Guertin, 190 Conn. 440, 461 A.2d 963 (1983) 17

State v. Niedermayer, 617 P.2d 911 (Or.Ct.App. 1980) 18, 24

State v. Paul, 548 N.W.2d 260 (Minn. 1996) 22

TABLE OF AUTHORITIES – Continued

Page

State v. Penas, 200 Neb. 387, 263 N.W.2d 835 (1978) 18, 24

State v. Ramirez, 814 P.2d 1131 (Utah Ct.App. 1991) 24

State v. Ricci, 739 A.2d 404 (N.H. 1999) 24

State v. Wren, 768 P.2d 1351 (Idaho Ct.App. 1989) 28

FEDERAL STATUTES

21 U.S.C. §841 14

28 U.S.C. §1254(1) 1

42 U.S.C. §1983 ..... 1, 5, 8

STATE STATUTES

California Penal Code §148 ..... 4, 5

MISCELLANEOUS

William A. Schroeder, *Factoring the Seriousness of the Offense into Fourth Amendment Equations*, 38 U. Kan. L. Rev. 439, 469-70 (1990) 30

OPINIONS BELOW

The Ninth Circuit's amended opinion, the subject of this petition, is reported at 706 F.3d 954 (9th Cir. 2013). (Appendix ["App."]1-23.) The Ninth Circuit's initial opinion was not published in the official reports. (App.24-44.) Its order amending the opinion and denying rehearing, filed January 16, 2013, is published at 706 F.3d 954, 956-57 (9th Cir. 2013). (App.3-4.) The district court's decision granting summary judgment to petitioner was not published in the official reports. (App.45-69.)

JURISDICTION

The Ninth Circuit initially filed its opinion on December 3, 2012. (App.24-44.) Petitioner timely petitioned for rehearing, and on January 16, 2013, the Ninth Circuit denied the petition and issued an amended opinion. (App.1-23.) This Court has jurisdiction to review the Ninth Circuit's January 16, 2013 decision on writ of certiorari under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondent brought the underlying action under 42 U.S.C. §1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of

> any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Respondent alleges petitioner violated her rights under the United States Constitution's Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. The Pursuit Into Plaintiff's Front Yard.

On May 27, 2008 around 1:00 a.m., Officer Mike Stanton and his partner responded to a call regarding a fight involving a baseball bat in the street in an area of La Mesa, California known for gang violence, where gang members were known to be armed with weapons including guns and knives. (App.6; ER 1-2, 4.)[1] The officers were driving a marked car and wearing police uniforms. (App.6.)

When they arrived at the fight scene, the officers saw three men walking in the street. (App.6; ER 1.) Two turned into a nearby apartment complex immediately upon seeing the patrol car. (App.6; ER 1.) The third crossed the street and quickly walked or ran toward the open front gate of an apartment located in the direction of the car. (App.6, 17; ER 1, 5.)

Officer Stanton exited the patrol car, announced "police," and repeatedly ordered the man to stop in a voice loud enough that anyone in the area would have heard his commands. (App.7; ER 1, 5.) From 25 feet away, the man looked directly at the officer, but instead of stopping, quickly entered the gate. (App.7, 17; ER 1, 5.) The gate, part of a solid wood fence over six feet high enclosing the apartment's small front

---

[1] "ER" denotes the excerpts of record, and "SER" the supplemental excerpts of record, filed in the Ninth Circuit.

yard, quickly shut behind him within a few feet of Officer Stanton. (App.7, 70; ER 1.)

Believing the suspect was disobeying a lawful police order – which, under California Penal Code §148, was the jailable misdemeanor of resisting or obstructing an officer[2] – and fearing for his safety, Officer Stanton made a "split-second decision" to kick open the gate. (App.7; ER 1-3.) Plaintiff and respondent Drendolyn Sims, who lived in the apartment, was standing behind the gate and was injured. (App.7.)

B. Plaintiff's Front Yard And Entryway.

Plaintiff states she "enjoy[s] a high level of privacy in [her] front yard." (App.7-8.) The fence prevents persons on the street from seeing into the yard and renders the space "completely secluded." (App.8.) Plaintiff uses the yard for storing her wheelchair and socializing. (App.8.)

A person standing on the street outside the gate can see plaintiff's front porch and door. (App.11 n.4, 70; ER 3, 6; SER 12.)[3] Before Officer Stanton entered

---

[2] California Penal Code §148 makes "willfully resist[ing], delay[ing], or obstruct[ing]" an officer discharging his duties a misdemeanor punishable by up to one year's imprisonment and a maximum $1,000 fine. §148; *In re M.M.*, 278 P.3d 1221, 1222 (Cal. 2012).

[3] To enter, a person pulls on a string hanging outside the gate, which opens the latch. (Pltf.'s Opp. to Summ. Jdgmt, Ex.2, district court docket #42-3 ["Pltf's Opp."], at 6; App.70.) Beyond

(Continued on following page)

the gate, he believed the suspect was about to go up the stairs to the front door. (ER 3.)

C. The Lawsuit And Appeal.

Plaintiff sued Officer Stanton under 42 U.S.C. §1983, alleging the warrantless entry into her yard violated her Fourth Amendment rights. (App.5.) The district court granted summary judgment to Stanton, holding the entry was constitutional and Stanton was entitled to qualified immunity. (App.55-62.)

Specifically, the court held exigent circumstances justified the entry because when Stanton observed three men at the fight scene quickly disperse upon seeing the officers, he had articulable suspicion for an investigatory stop, and when one suspect ignored his commands and fled, Stanton had grounds to detain and arrest under California Penal Code §148. (App.56-58.) The court held the entry was further justified by the lesser expectation of privacy in the curtilage of plaintiff's residence, as opposed to the home itself. (App.57-58.) The court explained:

> [T]he expectations of privacy for entry onto one's property by . . . a gate are markedly different from entry of the home by . . . the dwelling's front door. . . . [O]ne reasonably anticipates that the public may enter a gate . . . without first obtaining permission

---

the gate is a flat landing about 1½ yards long, leading to a few steps going up to the porch. (Pltf.'s Opp., at 8.)

> in order to approach the home itself. However, under no circumstance[s] does one reasonably anticipate that the public may enter one's home without permission.

(App.57-58 n.2.)

On qualified immunity, the district court concluded Stanton had not violated any clearly established right, partly because under *United States v. Santana*, 427 U.S. 38 (1976), "[a] 'suspect may not defeat an arrest . . . set in motion in . . . public . . . by escaping into a private place.'" (App.58-60.)

Plaintiff appealed. (App.5.)

On December 3, 2012, the Ninth Circuit reversed. (App.44.) Stanton petitioned for rehearing, and on January 16, 2013, the court denied the petition and issued an amended opinion, again reversing. (App.3-4.)

First, the Ninth Circuit held plaintiff's front yard was curtilage and therefore entitled to the same degree of Fourth Amendment protection as her home, so the warrantless entry was presumptively unconstitutional. (App.9-12.)

Second, the court held "hot pursuit" of the fleeing suspect did not justify entry because the offense of disobeying the officer's order to stop was a misdemeanor. (App.13-15.) The court reasoned "escape of a fleeing misdemeanant . . . is not . . . generally[ ] a serious enough consequence to justify . . . warrantless

entry," and nothing about the facts warranted a departure from this general rule. (App.14.)

Finally, the court denied qualified immunity, finding it "clearly established" that (1) under *Oliver v. United States*, 466 U.S. 170 (1984), plaintiff's front yard was curtilage and "therefore[ ] protected to the same extent as her home"; and (2) under *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984) a warrantless home entry "cannot be justified by pursuit of a suspected misdemeanant except in the rarest of circumstances," not present here. (App.21-22.)

REASONS TO GRANT THE PETITION

In *United States v. Santana*, 427 U.S. 38, 42-43 (1976), this Court held that when police officers initiate a lawful arrest in public and the suspect flees to a private residence, the officers may pursue the suspect into the residence without a warrant to complete the arrest. The Court reasoned that "a suspect may not defeat an arrest . . . set in motion in a public place . . . by the expedient of escaping to a private place." *Id.* at 43. *Santana* involved a felony suspect. *See id.* at 41; *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984). In *Welsh v. Wisconsin*, 466 U.S. at 753, the Court held that a warrantless entry into a home to arrest for a minor, non-felony offense could not be justified absent extremely "rare[ ]" exigent circumstances. The Court was careful to note in *Welsh* that the case did not involve a "hot pursuit." *Id.*

Here, petitioner Mike Stanton, a police officer, responded to the scene of a fight and attempted to detain a suspect. The suspect resisted Officer Stanton, committing a jailable misdemeanor, and fled into the fenced front yard of a residence through a gate used to access the front door. Stanton followed to arrest the suspect, and respondent Drendolyn Sims was injured while standing on the other side of the gate. In Sims's action under 42 U.S.C. §1983, the district court granted summary judgment to Officer Stanton based on qualified immunity. The Ninth Circuit reversed. Judge Reinhardt, writing for the court, held that it was clearly established that the front yard was curtilage subject to the same Fourth Amendment protection as the home itself, and, citing *Welsh*, that the "hot pursuit" doctrine of *Santana* does not apply to misdemeanors. (App.9-15.)

It is essential that this Court grant certiorari to review the Ninth Circuit's decision, because it reflects an ongoing conflict among the state and federal courts at every level on the issue of whether the hot pursuit doctrine applies to misdemeanors, and represents the latest in an unfortunately long line of Ninth Circuit departures from this Court's decisions dictating qualified immunity under precisely these circumstances.

The courts of 14 states – including California, the jurisdiction where this case arose – as well as the Sixth Circuit and numerous district courts have held that *Santana*'s hot pursuit rule applies to misdemeanors, thus allowing officers attempting to arrest a

suspect for a misdemeanor to pursue the suspect into a residence without a warrant. These courts reason that *Santana*'s justification for the rule, *i.e.*, that a suspect should not be allowed to flee a lawful arrest begun in a public place simply by retreating into a residence, applies with equal force to misdemeanors. The courts often note that in *Welsh*, this Court was careful to state that it was not confronted with a hot pursuit situation.

In contrast, two circuits – the Ninth and Tenth – along with the courts of seven states have held that *Santana*'s hot pursuit doctrine is limited to felonies, and that warrantless arrests inside the home for misdemeanors are governed by *Welsh*'s requirement that there be extraordinary exigent circumstances to justify a warrantless entry.

Not surprisingly, given this conflict and the fact that this Court has not expressly addressed the issue of whether hot pursuit in and of itself allows a warrantless entry into a home to arrest for a misdemeanor, three circuits – the First, Fifth and Eighth – along with one state court and several district courts, have found that qualified immunity shielded officers from liability for a warrantless entry made in hot pursuit to arrest for a misdemeanor, because the law is unclear.

Whether an officer may enter a home without a warrant in hot pursuit of a misdemeanor suspect is a recurring issue that arises routinely in suppression hearings and civil rights suits across the country,

directly affecting law enforcement officers' day-to-day decisions in detaining and arresting suspects. The ubiquity of this issue is evidenced by the more than 21 state appellate court opinions addressing the issue, the opinions of six circuit courts, and numerous district court opinions – and even these reflect only the tip of the iceberg, given that they represent only reported decisions and not the multitude of trial court suppression proceedings where the issue arises on a daily basis. It is essential that this Court grant review to address the issue left open in *Welsh*, namely whether hot pursuit in and of itself permits warrantless entry into a home to arrest for a misdemeanor.

Review is also warranted because the Ninth Circuit has once again departed from the basic principles governing qualified immunity, and in so doing has contributed to a circuit split on application of qualified immunity to cases involving hot pursuits to arrest for misdemeanors. This Court has repeatedly held that public officers are entitled to qualified immunity unless their conduct violates "clearly established law" – *i.e.*, unless "at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2083 (2011) (*quoting Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). For the law to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft*, 131 S.Ct. at 2083.

Here, the Ninth Circuit denied petitioner Stanton qualified immunity, finding that it was "clearly established" that the hot pursuit doctrine did not apply to misdemeanors and hence a warrantless entry to arrest for a misdemeanor would be permissible only in rare exigent circumstances not present here, citing *Welsh*. (App.22; *see* App.14-15.) Yet, in *Welsh*, this Court noted that the case before it did not involve a hot pursuit, and hence did not address the issue of whether *Santana*'s hot pursuit exception applied to a misdemeanor. *Welsh*, 466 U.S. at 753. The Ninth Circuit also cited its prior opinion in *United States v. Johnson*, 256 F.3d 895 (9th Cir. 2001) (en banc) as clearly holding that the hot pursuit doctrine did not apply to misdemeanors. (App.22; *see* App.14-15.) Yet, in *Johnson*, the Ninth Circuit acknowledged that the case did not involve a hot pursuit. 256 F.3d at 907-08.

Moreover, as noted, a majority of the state courts that have considered the issue – 14, including California – as well as one circuit court and several district courts, have held that the hot pursuit doctrine applies to misdemeanors. Indeed, as noted, three circuit courts, one state appellate court, and several district courts have applied qualified immunity precisely because the issue is unsettled. It is untenable to assert, as the Ninth Circuit does, that the law concerning application of the hot pursuit doctrine to misdemeanors is "clearly established."

The Ninth Circuit has again recklessly departed from the standards governing qualified immunity, and it is essential that this Court grant review to

compel adherence to its precedents and to resolve the clear circuit split on application of qualified immunity to cases involving hot pursuit for a misdemeanor. *Ryburn v. Huff*, 132 S.Ct. 987, 990 (2012) (per curiam) (reversing Ninth Circuit's denial of qualified immunity for warrantless home entry because officers' conduct did not violate clearly established law); *Messerschmidt v. Millender*, 132 S.Ct. 1235 (2012) (reversing Ninth Circuit's denial of qualified immunity because officer's procurement of allegedly overbroad warrant did not violate clearly established law); *Ashcroft*, 131 S.Ct. at 2085 (reversing Ninth Circuit's denial of qualified immunity because Attorney General's conduct did not violate clearly established law); *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (reversing Ninth Circuit's denial of qualified immunity because law was not clearly established concerning officer's use of deadly force against a felony suspect fleeing in a vehicle); *Safford Unified Sch. Dist. v. Redding*, 557 U.S. 364, 378 (2009) (reversing Ninth Circuit's denial of qualified immunity because law concerning strip search of minor schoolchildren was not clearly established).

I. REVIEW IS NECESSARY TO RESOLVE A CONFLICT AMONG STATE AND FEDERAL COURTS AT EVERY LEVEL CONCERNING WHETHER "HOT PURSUIT" OF A FLEEING SUSPECT, IN AND OF ITSELF, ALLOWS POLICE OFFICERS TO ENTER A HOME WITHOUT A WARRANT TO ARREST FOR A MISDEMEANOR.

A. In *United States v. Santana*, This Court Held That "Hot Pursuit" Of A Fleeing Suspect Independently Justifies A Warrantless Home Entry, Because A Suspect May Not Frustrate An Arrest Begun In A Public Place By Fleeing To A Residence.

In *United States v. Santana*, 427 U.S. 38 (1976), police officers had probable cause to believe a suspect had just sold them narcotics. *Id.* at 39, 41. The suspect was standing in the doorway of a residence, and when the officers approached to arrest her, she retreated into the house and the officers followed. *Id.* at 40-41. This Court held that when the police first sought to arrest the suspect, she was in a "public place" where the police could constitutionally arrest her without a warrant, and the suspect's "act of retreating into her house could [not] thwart [the] otherwise proper arrest." *Id.* at 42. The Court reasoned:

> [A] suspect may not defeat an arrest which has been set in motion in a public place . . .

> by the expedient of escaping to a private place.

Id. at 43.[4]

The Court also noted that once the suspect saw the police, there was "a realistic expectation that any delay would result in destruction of evidence." *Id.* But the Court did not rely on such exigencies to justify the entry. Rather, "'hot pursuit'" of the suspect was, in itself, "sufficient to justify the warrantless entry into [her] house." *Id.*[5] *Santana* involved an arrest for violation of 21 U.S.C. §841, a felony. *Id.* at 41; *see Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984).

In the intervening years, the Court has repeatedly reaffirmed *Santana*'s hot pursuit exception to the warrant requirement. *See Payton v. New York*, 445 U.S. 573, 574-75 & n.1 (1980) (addressing open issue on warrantless arrests in a home, but noting via "*cf.*" citation that *Santana* resolved one aspect of the question); *Steagald v. United States*, 451 U.S. 204, 221-22 (1981) (warrant generally required for entry

---

[4] In so holding, the Court relied on its decision in *Warden v. Hayden*, 387 U.S. 294 (1967), where the Court had upheld the warrantless entry into a home to arrest an armed robbery suspect whom witnesses had seen enter the home several minutes before officers arrived. *Santana*, 427 U.S. at 42-43.

[5] Indeed, in dissent, Justice Marshall criticized the Court's "hot pursuit justification," because it "disregard[ed] whether exigency justified the police" in entering a home. *Id.* at 45, 47 (Marshall, J., dissenting); *see also id.* at 47 ("the Court's approach does not depend on whether exigency justifies an arrest on private property").

into third-party residence to effect arrest, but "a warrantless entry of a home would be justified if the police were in 'hot pursuit' of a fugitive"); *Kentucky v. King*, 131 S.Ct. 1849, 1856 (2011) ("Police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect"). However, as we discuss, the Court has never expressly addressed whether the hot pursuit exception applies to misdemeanors, and its discussion of the exigent circumstances exception to the warrant requirement as applied to misdemeanors in *Welsh v. Wisconsin*, 466 U.S. 740, has spawned wholesale confusion among courts across the country.

B. *Welsh v. Wisconsin* Creates Ambiguity As To Whether Hot Pursuit, In And Of Itself, Justifies A Warrantless Home Entry To Effect An Arrest For A Misdemeanor.

In *Welsh v. Wisconsin*, 466 U.S. 740, a witness notified police after seeing a motorist drive erratically, then exit the car and leave the scene. *Id.* at 742. Officers procured the driver's address from the vehicle registration and went to his home a short distance away. *Id.* at 742-43. The police entered the home without a warrant and arrested him for driving while intoxicated, which was only a civil, non-jailable offense under Wisconsin law. *Id.* at 743, 754.

In *Payton v. New York*, 445 U.S. 573, the Court had held that a warrantless arrest in a home could

not be justified absent probable cause and exigent circumstances. *Id.* at 583-90. The question in *Welsh* was whether the warrantless entry to arrest a suspect for a civil offense was justified by exigent circumstances. 466 U.S. at 753. The Court observed that while it had previously suggested that various exigent circumstances might justify a warrantless entry to search or arrest, such as destruction of evidence[6] or ongoing fire,[7] it had "actually applied only the 'hot pursuit' doctrine to arrests in the home," citing *Santana*, 466 U.S. at 750.

The State argued that the warrantless entry was justified by continuation of a hot pursuit, the need to prevent destruction of evidence through dissipation of alcohol in the suspect's bloodstream as time passed, and protection of the public from an impaired driver. *Id.* at 753.

Significantly, the Court rejected the first contention because there was no hot pursuit at issue in the case, since "there was no immediate or continuous pursuit of the [suspect] from the scene of a crime." *Id.* The Court then addressed the claimed exigent circumstances for which there was at least a factual basis in the record.

The Court found that protection of the public was not a valid justification because the suspect was

---

[6] *Schmerber v. California*, 384 U.S. 757, 770-71 (1966).

[7] *Michigan v. Tyler*, 436 U.S. 499, 509 (1978).

found at home and had abandoned his car. *Id.* The Court then held that preservation of evidence was not a sufficiently weighty concern to offset the significant invasion into the core Fourth Amendment-protected sanctity of the home, because the offense at issue was so minor – merely a civil, non-jailable offense. *Id.* at 754. In so holding, the Court, in a passage that would sow the seeds of confusion over the next 29 years, observed that the severity of the offense had been deemed relevant in evaluating a wide range of exigent circumstances:

> [C]ourts have permitted warrantless home arrests *for major felonies* if identifiable exigencies, independent of the gravity of the offense, existed at the time of the arrest. [Citation.] But of those courts addressing the issue, *most have refused to permit warrantless home arrests for nonfelonious crimes.* See, e.g., *State v. Guertin*, 190 Conn. 440, 453, 461 A.2d 963, 970 (1983) ("The [exigent-circumstances] exception is narrowly drawn to cover cases of real and not contrived emergencies. The exception is limited to the investigation of serious crimes; misdemeanors are excluded"); *People v. Strelow*, 96 Mich.App. 182, 190-193, 292 N.W.2d 517, 521-522 (1980). See also *People v. Sanders*, 59 Ill.App.3d 6, 16 Ill.Dec. 437, 374 N.E.2d 1315 (1978) (burglary without weapons not grave offense of violence for this purpose); *State v. Bennett*, 295 N.W.2d 5 (S.D. 1980) (distribution of controlled substances not a grave offense for these purposes). *But cf.*

> *State v. Penas, 200 Neb. 387, 263 N.W.2d 835 (1978) (allowing warrantless home arrest upon hot pursuit from commission of misdemeanor in the officer's presence; decided before Payton); State v. Niedermeyer, 48 Ore.App. 665, 617 P.2d 911 (1980) (allowing warrantless home arrest upon hot pursuit from commission of misdemeanor in the officer's presence). The approach taken in these cases should not be surprising. Indeed, without necessarily approving any of these particular holdings or considering every possible factual situation, we note that it is difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is extremely minor.*

Id. at 752-53 (emphasis added).

The confusion stems from the Court's observation that most lower court decisions had permitted warrantless home arrests for felonies if exigencies existed, but had refused to permit warrantless home arrests for non-felonies, although it noted via a *cf.* citation two state decisions allowing a warrantless home arrest based upon hot pursuit for a misdemeanor committed in an officer's presence. *Id.* The Court's caution that it was not "necessarily approving any of these particular holdings," coupled with the admonition that "application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed," *id.*

at 753, cast doubt on whether *Santana*'s hot pursuit exception, in and of itself, allowed a warrantless home entry to arrest for a minor offense. This uncertainty was magnified by the Court's suggestion that there might be an open issue as to whether the Fourth Amendment imposes an "absolute ban on warrantless home arrests for certain minor offenses," though noting that it had "no occasion to consider" the issue here. *Id.* at 749 n.11.

Following *Welsh*, state and federal courts have been sharply divided on whether hot pursuit, in and of itself, allows a warrantless entry to arrest for a misdemeanor. Courts finding that hot pursuit in and of itself justifies a warrantless entry to arrest for a misdemeanor note that *Santana*'s justification for the rule – that the target of a lawful arrest in a public place should not be able to escape simply by fleeing to a residence – applies with equal force to misdemeanors, and that in *Welsh* this Court expressly noted it was not confronted with a hot pursuit. In contrast, other courts (including the Ninth Circuit here) have viewed hot pursuit as simply one among various exigencies and construed *Welsh* as holding that few, if any exigencies – including hot pursuit – would justify warrantless entry to arrest for a misdemeanor.

C. Federal And State Courts Are Divided On Whether Hot Pursuit Of A Fleeing Misdemeanant, In And Of Itself, Justifies A Warrantless Home Entry.

1. The Sixth Circuit, Numerous District Courts And 14 State Courts Have Held That Hot Pursuit, In And Of Itself, Justifies A Warrantless Home Entry To Arrest For A Misdemeanor.

The Sixth Circuit has held that hot pursuit of a fleeing misdemeanant justified a warrantless home entry. In *United States v. Johnson*, 106 F.App'x 363, 364-65 (6th Cir. 2004), officers pursued a suspect into his home after seeing him fire a shotgun into the air from the porch. The officers searched the home and arrested the suspect for violating state misdemeanor laws and city ordinances. *Id.* at 365. The court held that "hot pursuit" of the fleeing suspect justified the warrantless entry. *Id.* at 367-68. Because the suspect was armed and the officers had searched the home, the court relied on this Court's decision in *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967), which had upheld a warrantless home entry to arrest a fleeing armed robbery suspect and a search of the home, and which this Court relied on in *Santana*, 427 U.S. at 42-43. *Id.* at 367. The Sixth Circuit further noted that *Welsh* had not "foreclosed the possibility that [warrantless home entries] may be made to search for misdemeanants." *Id.*

Several district courts have also held that under *Santana*, officers may pursue a fleeing misdemeanant

into a home to prevent the suspect from frustrating the arrest, without additional exigent circumstances.[8]

Fourteen states – including California, Officer Stanton's jurisdiction – have also held that hot pursuit of a fleeing misdemeanant independently justifies a warrantless home entry, without additional exigent circumstances. *See*:

- *People v. Lloyd*, 265 Cal.Rptr. 422, 424-25 (Cal.Ct.App. 1989) (resisting detention for traffic violations; where hot pursuit into home is based on arrest begun in public, "that the offenses . . . were misdemeanors is of no significance"; *Welsh* did not "involve pursuit into a home after the initiation of a detention or arrest in . . . public"); *In re Lavoyne M.*, 270 Cal.Rptr. 394, 395-96 (Cal.Ct.App. 1990) (similar facts and holding);
- *Gasset v. State*, 490 So.2d 97, 98-99 (Fla.Dist.Ct.App. 1986) (DUI suspect "waived any expectation of privacy . . . by . . . leading the officers directly to [his home]"; "enforcement of our criminal laws . . . is not a game where . . . one is

---

[8] *See, e.g.*, *Griffin v. City of Clanton*, 932 F.Supp. 1359, 1366-67 (M.D. Ala. 1996); *Lockett v. City of Akron*, 714 F.Supp.2d 823, 831-32 (N.D. Ohio 2010); *Haupricht v. Contrada*, No. 3:08CV2961, 2009 WL 5061762, at *3 (N.D. Ohio Dec. 15, 2009); *St. Laurent v. Town of Sturbridge*, No. CIV.A. 89-30005-F, 1990 WL 92470, at *6-7 (D. Mass. June 18, 1990); *Cooper v. Smith*, No. CIV.A. 905CV157, 2007 WL 339174, at *5-6 (E.D. Tex. Jan. 31, 2007).

'safe' if one reaches 'home' before being tagged"; *Welsh* involved "a civil non-jailable offense" and "no immediate and continuous pursuit"), 99-100 (dissent concluded no exigencies justified entry);

- *State v. Paul*, 548 N.W.2d 260, 264-68 (Minn. 1996) (DUI; "a bright-line felony rule" would (1) "send a message . . . that . . . an arrest . . . can be thwarted by beating the police to one's door"; (2) hinder law enforcement by "forc[ing]" officers to determine whether an offense is a felony or misdemeanor "on the spot in the tense and often dangerous circumstances of hot pursuit"; and (3) prohibit warrantless home arrests for misdemeanors where "the underlying conduct is serious" or the suspect's "activity . . . during . . . flight . . . elevates the situation to a serious one"), 268 (dissent concluded "even with hot pursuit and exigent circumstances," entry for misdemeanor is "unreasonable");

- *State v. Alvarez*, 31 So.3d 1022 (La. 2010) (carrying concealed weapon; citing *Santana* policy and distinguishing *Welsh*); *State v. Bell*, 28 So.3d 502, 508-10 (La.Ct.App. 2009) (marijuana possession; *Santana* "recognized the exigent circumstances inherent in a . . . hot pursuit"; distinguishing *Welsh*);

- *City of Middletown v. Flinchum*, 765 N.E.2d 330, 332 (Ohio 2002) (traffic

offenses and resisting arrest; suspect should not get "a free pass merely because he was not charged with a more serious crime"), 333-34 (dissent applied *Welsh*, and reasoned *Santana* involved a felony and destruction of evidence);

- *Lepard v. State*, 542 N.E.2d 1347, 1350 (Ind.Ct.App. 1989) (DUI and resisting officer; "fleeing . . . a police officer creates an exigent circumstance" justifying in-home arrest);

- *LaHaye v. State*, 1 S.W.3d 149, 152-53 (Tex.Ct.App. 2000) (DUI; under *Santana*, "[e]xigent circumstances exist when the police are in hot pursuit"; distinguishing *Welsh* as involving nonjailable offense and no hot pursuit);

- *People v. Wear*, 893 N.E.2d 631, 645-46 (Ill. 2008) (DUI; entry justified under *Santana* because officer "had probable cause to arrest [suspect] at the threshold and [suspect] continued inside"; distinguishing *Welsh* as involving nonjailable offense and no hot pursuit), 647-52 (concurrence concluded hot pursuit cannot justify entry without considering seriousness of crime and totality of circumstances);

- *Brock v. State*, 396 S.E.2d 785, 786-87 (Ga.Ct.App. 1990) (traffic violation; hot pursuit justified entry under *Santana*);

- *State v. Ramirez*, 814 P.2d 1131, 1134-35 (Utah Ct.App. 1991) (backup officer could reasonably believe suspect committed misdemeanor; suspect "cannot reduce a legitimate arrest to a game of 'tag' by reaching 'home' a few steps ahead of the police"; *Welsh* involved no hot pursuit and did not limit entry to felonies);
- *City of Kirksville v. Guffey*, 740 S.W.2d 227, 228-29 (Miss.Ct.App. 1987) (DUI; finding exigent circumstances based on hot pursuit; distinguishing *Welsh* as involving nonjailable offense and no hot pursuit);
- *State v. Ricci*, 739 A.2d 404, 407-08 (N.H. 1999) (disobeying officer; suspect "cannot trigger the need for a warrant by racing the police" to home);
- *State v. Penas*, 263 N.W.2d 835, 837-38 (Neb. 1978) (DUI and evading officer; "'hot pursuit'" is "an exigent circumstance" justifying entry under *Santana*);
- *State v. Niedermayer*, 617 P.2d 911, 913 (Or.Ct.App. 1980) (traffic misdemeanors; citing *Santana*).[9]

---

[9] The District of Columbia has held that hot pursuit justified a warrantless home entry under *Santana* where a suspect fled a *Terry* stop, suggesting that *a fortiori*, such entry would be justified based on hot pursuit of a fleeing misdemeanant. *Edwards v. United States*, 364 A.2d 1209, 1214 (D.C. 1976).

2. The Ninth And Tenth Circuits, Several District Courts And The Courts Of Seven States Have Held That Hot Pursuit, In And Of Itself, Cannot Justify Warrantless Entry Into A Home To Arrest For A Misdemeanor.

As noted, here the Ninth Circuit concluded that while there might be a hot pursuit under *Santana*, nonetheless it could not justify a warrantless entry into areas of a home – here the curtilage area of the front yard – simply to arrest for a misdemeanor. (App.13-15.) The court distinguished *Santana* as "involv[ing] a fleeing felon and the exigency of potential destruction of evidence," and reasoned *Welsh* "made it clear that the exigency exception to the warrant requirement generally applies only to a fleeing felon." (App.15.) The court denied qualified immunity, reasoning that *Welsh* "clearly established" pursuit of a suspected misdemeanant would "rarely, if ever, justify warrantless entry." (App.22.)

The Ninth Circuit is not alone in this view. In *Mascorro v. Billings*, 656 F.3d 1198 (10th Cir. 2011), the Tenth Circuit denied qualified immunity under similar circumstances. There, officers pursued a suspect into his home after attempting to stop him for a traffic violation. *Id.* at 1202. The court reasoned the offense was, at most, a nonviolent misdemeanor raising no concerns about destruction of evidence. *Id.* at 1205 n.9. The court construed *Santana*'s justification for warrantless entry as resting on exigent circumstances, including potential destruction of

evidence and a fleeing felon. *Id.* at 1207 & n.12, 1209. Relying on *Welsh*, the court found "[t]he warrantless entry based on hot pursuit" unjustified because no exigencies existed – specifically, the intended arrest was for a minor offense and there was little risk of escape, destruction of evidence, or safety concerns. *Id.* at 1207.

The Tenth Circuit also denied qualified immunity, finding it clearly established that hot pursuit of a fleeing suspect cannot justify home entry without additional exigent circumstances, and that *Welsh* held the gravity of the offense "is a vital component of *any* exigent circumstances justifying warrantless [home] entry" – including hot pursuit. *Id.* at 1208-09 (original emphasis). This holding was somewhat surprising, given that only three months earlier, a different panel of the same court had held in an unpublished opinion that an officer was entitled to qualified immunity under similar circumstances, because the law was not clearly established.[10]

Numerous district courts have similarly held that hot pursuit of a fleeing misdemeanant does not justify a warrantless home entry absent additional exigent circumstances.[11]

---

[10] *Aragon v. City of Albuquerque*, 423 F.App'x 790, 795 (10th Cir. 2011).

[11] *See, e.g., Kolesnikov v. Sacramento County*, No. CIVS-06-2155 RRB EFB, 2008 WL 1806193, at *5 (E.D. Cal. Apr. 22, 2008); *Smith v. City of Sturgis*, No. 1:11-CV-390, 2012 WL

(Continued on following page)

The courts of seven states have joined the Ninth and Tenth Circuits in holding that hot pursuit of a fleeing misdemeanant cannot justify a warrantless home entry without additional exigencies. *See*:

- *State v. Bolte*, 560 A.2d 644, 654-55 (N.J. 1989) (traffic and disorderly persons offenses were "minor"; "hot pursuit alone" cannot justify entry without exigent circumstances);
- *State v. Dugan*, 276 P.3d 819, 830, 832-33 (Kan.Ct.App. 2012) (nonviolent, jailable traffic offense; hot pursuit "alone" does not furnish "absolute exception" to warrant requirement);
- *Butler v. State*, 829 S.W.2d 412, 415 (Ark. 1992) (no exigency where officer pursued a suspect into home to arrest for disorderly conduct allowing 30 days' imprisonment, a "minor offense");
- *State v. Bessette*, 21 P.3d 318, 320-21 (Wash.Ct.App. 2001) (no exigency justified entry in pursuit of a minor possessing alcohol);

3010939, at *8 (W.D. Mich. Jul. 23, 2012) (denying qualified immunity); *Knowles v. City of Benicia*, 785 F.Supp.2d 936, 946-50 (E.D. Cal. 2011) (same); *Sero v. City of Waterloo*, No. C08-2028, 2009 WL 2475066, at *8-9, 11 (N.D. Iowa Aug. 11, 2009) (same); *see Croal v. United Healthcare of Wisconsin, Inc.*, No. 07-CV-837, 2009 WL 913641, at *13-14 (E.D. Wis. Mar. 31, 2009); *Hameline v. Wright*, No. 1:07-CV-69, 2008 WL 2696920, at *6 (W.D. Mich. June 30, 2008).

- *State v. Wren*, 768 P.2d 1351, 1354-55, 1358 (Idaho Ct.App. 1989) (remanding for findings, but holding "hot pursuit, by itself," insufficient to justify warrantless entry);
- *Commonwealth v. Curry*, Nos. 91-429, 430 & 431, 1992 WL 884417, at *2-5 (Va.Cir.Ct. Jan. 6, 1992) (no exigency justified entry for DUI and evading officer; hot pursuit exception "applies only to . . . fleeing felons"; equating "'minor' with misdemeanor and 'serious' with felony");
- *State v. Greer*, No. C.R. 0604013367, 2007 WL 442228, at *3 (Del.Com.Pl. Feb. 6, 2007) (no exigency justified entry for traffic offenses; hot pursuit doctrine applies only to felons).

D. Review Is Necessary to Resolve The Ongoing Conflict Among The Courts And Clarify Whether Hot Pursuit, In And Of Itself, Justifies Warrantless Entry Into A Home To Arrest For A Misdemeanor.

Courts across the country are plainly divided on whether hot pursuit, in and of itself, justifies a warrantless home entry to arrest for a misdemeanor. Not surprisingly, three circuits and one state appellate court have found officers entitled to qualified immunity for warrantless home entries based on hot pursuit

where the underlying offense was a misdemeanor, precisely because the law is unsettled. *See*:

- *Greiner v. City of Champlin*, 27 F.3d 1346, 1351, 1353-54 (8th Cir. 1994) (arrest for public nuisance, disorderly conduct and obstructing legal process; *Welsh* did not "flatly" prohibit warrantless misdemeanor home arrests, circuit and state courts "differed" on "how much uncharted territory *Welsh* [left] open," and state courts in officers' jurisdiction had approved warrantless misdemeanor home arrests based on "hot pursuit");

- *Joyce v. Town of Tewksbury*, 112 F.3d 19, 20, 22 (1st Cir. 1997) (en banc) (arrest for violating domestic restraining order; "hot pursuit" may justify home entry under *Santana*, and domestic-violence crimes are "grave offenses"), 24 (concurrence concluded "hot pursuit" justified warrantless entry, reasoning under *Santana*, it was "reasonable" to follow suspect into home when he refused to cooperate with arrest);

- *Payne v. City of Olive Branch*, 130 F.App'x 656, 661-62 (5th Cir. 2005) (back-up officer could reasonably assume fleeing suspect committed jailable misdemeanor; under *Santana*, "hot pursuit" justifies warrantless entry, whereas *Welsh* involved a less serious offense);

- *Goines v. James*, 433 S.E.2d 572, 576-78 (W.Va. 1993) (*Welsh* did not "clearly

> establish under what circumstances a warrantless home arrest upon hot pursuit from a commission of a misdemeanor" is unconstitutional).

Several district courts have also applied qualified immunity where officers pursued fleeing misdemeanants into a home, because it could not be said that the law was "clearly established."[12]

One scholar has noted the clear division of courts on the issue and observed that it is "unclear whether [*Welsh*] intended to limit *Santana* to fleeing felons." William A. Schroeder, *Factoring the Seriousness of the Offense into Fourth Amendment Equations*, 38 U.Kan.L.Rev. 439, 469-70 (1990). He further noted that *Welsh* "implicitly suggested that a warrantless home arrest for a minor offense might be reasonable" based on hot pursuit. *Id.* at 446, 469-70.

Petitioner submits that review of this Court's decisions supports the conclusion that *Santana*'s hot pursuit doctrine applies to misdemeanors for the very reason recognized by the majority of courts that have considered the question: A lawful arrest in a public place should not be defeated merely by running into a

---

[12] *See, e.g., Bash v. Patrick*, 608 F.Supp.2d 1285, 1299-1300 (M.D. Ala. 2009); *Garcia v. City of St. Paul*, No. CIV.0983 (JNE/AJB), 2010 WL 1904917, at *6 (D. Minn. May 10, 2010); *Kolesnikov v. Sacramento County*, No. CIVS-06-2155 RRB EFB, 2008 WL 1806193, at *7 & n.20 (E.D. Cal. Apr. 22, 2008); *Garcia v. City of Imperial*, No. 08CV2357 BTM PCL, 2010 WL 3834020, at *6 (S.D. Cal. Sept. 28, 2010).

residence. It is flatly against the public interest to encourage suspects to flee from arrest by taking refuge in any nearby yard or residence, either their own or, worse yet, someone else's – the latter scenario particularly fraught with the potential to increase exponentially the danger to officers and innocent citizens.

Yet, regardless of how the issue is ultimately resolved, it is plain that the law is unsettled and lower courts are in conflict over whether the hot pursuit doctrine applies where the underlying offense is a misdemeanor. The confusion imposes a particularly onerous burden on law enforcement officers within the Ninth Circuit, like Stanton in California and his colleagues in Oregon, who face the prospect of federal civil rights liability under circumstances where their own states' courts have expressly authorized warrantless home entries in hot pursuit to arrest for a misdemeanor. Law enforcement officers across the country require clear rules in making daily split-second decisions concerning pursuits and arrests that may, in some circumstances, be a matter of life or death. Trial courts, whether confronted with civil rights suits or the ubiquitous suppression hearings of day-to-day criminal court practice, require firm guidelines to assure uniform application of the law, and to avoid the expenditure of scarce public, private and judicial resources in needless litigation. It is essential that this Court grant review.

II. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S DENIAL OF QUALIFIED IMMUNITY CONTRAVENES THIS COURT'S PRECEDENTS AND IT IS NECESSARY TO RESOLVE THE CONFLICT AMONG APPELLATE COURTS CONCERNING APPLICATION OF QUALIFIED IMMUNITY WHERE OFFICERS ENTER A RESIDENCE IN HOT PURSUIT OF A FLEEING MISDEMEANANT.

A police officer is entitled to qualified immunity if "a reasonable officer could have believed [his actions] lawful, in light of clearly established law and the information the . . . officer[ ] possessed." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). This Court has admonished that to be clearly established, "[t]he contours of [a] right must be sufficiently clear that a reasonable [officer] would understand that what he is doing violates that right." *Id.* at 640. In other words, "existing precedent must have placed the . . . constitutional question beyond debate." *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2083 (2011). Moreover, clearly established law must be determined "'in light of the specific context of the case, not as a broad general proposition.'" *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). Qualified immunity "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft*, 131 S.Ct. at 2085.

Just last term, this Court summarily reversed the Ninth Circuit's denial of qualified immunity for a warrantless home entry because the Circuit failed to apply these principles. *Ryburn v. Huff*, 132 S.Ct. 987,

990 (2012). This Court reasoned that none of its prior decisions had "found a Fourth Amendment violation on facts even roughly comparable" to those before the Circuit, and indeed a reasonable officer could read this Court's opinions as "pointing in the opposite direction." *Id.* The Ninth Circuit's denial of qualified immunity here again violates these principles and requires intervention by this Court.

1. The Law Concerning Application Of *Santana*'s Hot Pursuit Doctrine To Misdemeanors Is Not Clearly Established, And It Is Necessary To Resolve The Conflict Among Appellate Courts Concerning Application Of Qualified Immunity In Such Cases.

The Ninth Circuit's conclusion that it was clearly established that an officer cannot make a warrantless entry into areas of the home protected by the Fourth Amendment, in hot pursuit of a suspect fleeing arrest for a misdemeanor, is untenable. The Ninth Circuit cited *Welsh* as establishing this rule (App.21-22), but as previously discussed, *Welsh* did not involve a hot pursuit, and its discussion of the hot pursuit doctrine as applied to misdemeanors is, at best, ambiguous – a fact confirmed by the decisions of the appellate courts of 14 states and the Sixth Circuit, which have applied *Santana*'s hot pursuit exception to misdemeanors.[13]

---

[13] *See* §I.C.1, *supra*.

Safford Unified Sch. Dist. v Redding, 557 U.S. 364, 378-79 (2009) (applying qualified immunity where "cases viewing [the constitutional issue] differently . . . are numerous enough . . . to counsel doubt that [this Court was] sufficiently clear in the prior statement of law"). Indeed, three circuits and one state appellate court have found officers entitled to qualified immunity under similar circumstances post-*Welsh* precisely because the law on the question is not clearly established.[14]

The Ninth Circuit also cited its prior en banc decision in *United States v. Johnson*, 256 F.3d 895 (9th Cir. 2001) as having established that under *Welsh*, hot pursuit would not justify a warrantless entry to arrest for a minor offense. (App.22.; *see* App.15.) However, in *Johnson*, the court expressly noted that it was not confronted with a hot pursuit. 256 F.3d at 907-08. There, an officer attempted to arrest a suspect based on outstanding arrest warrants for misdemeanors including intoxicated driving, driving with a suspended license, resisting arrest, malicious mischief, and criminal impersonation. *Id.* The Ninth Circuit found the hot pursuit exception inapplicable because the exception "only applies when officers are in 'immediate' and 'continuous' pursuit of a suspect from the scene of the crime," and when the officers entered defendant's property, no one had seen the suspect for over half an hour. *Id.* at 907-08. That

---

[14] *See* §I.D, *supra*.

Johnson did not "clearly establish" that *Santana*'s hot pursuit doctrine was inapplicable to misdemeanors is underscored by the fact that even post-*Johnson*, district courts within the Circuit granted qualified immunity to officers for warrantless entries in hot pursuit to arrest for misdemeanors, because the law was unsettled.[15]

Given the lack of clarity on the issue, Officer Stanton could reasonably believe that he could lawfully enter a home, not just a gated front yard, in hot pursuit of a suspect fleeing arrest for a misdemeanor. Indeed, Stanton's belief was particularly reasonable given that he was trained to follow California law, and California appellate courts have expressly applied *Santana*'s hot pursuit exception to misdemeanors. *People v. Lloyd*, 265 Cal.Rptr. 422, 424-25 (Cal.Ct.App. 1989) (under *Santana*, suspect's refusal to comply with lawful detention for traffic citation justified "hot pursuit" into house to complete arrest; hot pursuit is an exigent circumstance and "the fact that the offenses . . . were misdemeanors is of no significance"); *In re Lavoyne M.*, 270 Cal.Rptr. 394, 395-96 (Cal.Ct.App. 1990) (hot pursuit justified warrantless home entry to arrest for misdemeanor of resisting officer attempting to detain for traffic violations).

---

[15] *Kolesnikov v. Sacramento County*, No. CIVS-06-2155 RRB EFB, 2008 WL 1806193, at *7 & n.20 (E.D. Cal. Apr. 22, 2008); *Garcia v. City of Imperial*, No. 08CV2357 BTM PCL, 2010 WL 3834020, at *6 (S.D. Cal. Sept. 28, 2010).

The absence of clearly established law concerning application of *Santana*'s hot pursuit doctrine to misdemeanors, in and of itself, entitles Stanton to qualified immunity.

Unfortunately, the Ninth Circuit is not alone in its refusal to apply qualified immunity in these circumstances. As noted, in *Mascorro v. Billings*, 656 F.3d 1198 (10th Cir. 2011), the Tenth Circuit similarly found that the law governing hot pursuit for misdemeanors was "clearly established" and denied qualified immunity – a holding all the more remarkable (and ironic) given that only three months earlier a panel of the same court had, in an unpublished disposition, applied qualified immunity in similar circumstances because the law was not "clearly established."[16]

There is a clear circuit split on the issue of whether the law governing hot pursuit to arrest for a misdemeanor is clearly established, and it is vital that this Court grant review to assure proper application of the doctrine of qualified immunity and to resolve the ongoing conflict among the courts.

---

[16] *See* §I.C.2 & n.10, *supra*.

2. The Law Concerning An Officer's Ability To Enter Portions Of The Curtilage Used To Access A Residence In Order To Effect An Arrest For A Jailable Offense Was Not Clearly Established At The Time Of The Incident.

Even putting aside qualified immunity based solely on the lack of clarity concerning the hot pursuit doctrine, Officer Stanton is still entitled to qualified immunity based on the absence of clearly established law concerning officers' ability to enter portions of the curtilage used for access to a residence in order to effect an arrest for something more than a minor, non-jailable offense.

As a threshold matter, Stanton could reasonably believe he was entitled to enter plaintiff's front yard because it was used to access the residence. Ninth Circuit cases predating the incident had held that officers, without a warrant, may enter portions of curtilage used for ingress to a residence. For example, in *United States v. Roberts*, 747 F.2d 537, 540, 542 (9th Cir. 1984), the court held officers did not violate the Fourth Amendment by approaching a residence's front door through the front yard in the curtilage. The court noted that "anyone may 'openly and peaceably . . . walk up the steps and knock on the front door of any man's "castle"'" to question the occupant – "'whether the questioner be a pollster, a salesman, or an officer of the law.'" *Id.* at 543; *see also United States v. Magana*, 512 F.2d 1169, 1170-71 (9th Cir. 1975) (officers constitutionally entered driveway in

curtilage to investigate and position themselves to "follow up" with arrest or search); *United States v. Garcia*, 997 F.2d 1273, 1279-80 (9th Cir. 1993) (officers were "no different from any other member of the public" when they constitutionally entered back porch, believing it was front entrance, to investigate).

Similarly, the California Supreme Court had held officers may constitutionally enter areas adjacent to a residence used for ingress, such as a front porch or driveway. *People v. Edelbacher*, 766 P.2d 1, 20 (Cal. 1989) (officer constitutionally entered front porch, driveway, and front yard on "the normal route used by visitors approaching the front doors"); *see also Lorenzana v. Superior Court*, 511 P.2d 33, 35 (Cal. 1973) ("A sidewalk, pathway, common entrance or similar passageway offers an implied permission to the public [and officers] to enter").

Moreover, a California appellate court had held that an officer could properly hop a fence into a backyard in the curtilage to detain a suspect for trespassing, reasoning that (1) an entry into the curtilage does not per se violate the Fourth Amendment, (2) residents have no reasonable expectation of privacy in areas "furnishing normal access to the house," and (3) the officer did not unreasonably "depart[] from a normal [access] route" considering "the public concern for . . . prevention of crime" served by the detention. *People v. Thompson*, 270 Cal.Rptr. 863, 873-75 (Cal.Ct.App. 1990); *see also People v. Chavez*, 75 Cal.Rptr.3d 376, 381 (Cal.Ct.App. 2008) ("'police with legitimate business may enter areas of the

curtilage which are impliedly open, such as access routes to the house'").

Here, from outside plaintiff's front gate, Officer Stanton could see the front porch and door and believed the suspect was about to go up the stairs to the door. (App.11 n.4, 70; ER 3, 6; SER 12.) The gate opens by pulling on a string hanging outside and leads directly to the front door. *See* n.3, *supra*. Thus, although the yard was enclosed, plaintiff could reasonably expect the public – *e.g.*, visitors, solicitors, or delivery persons – to open the gate and enter the yard to reach the front door. Since the public could do so, an officer could reasonably believe he also could enter without a warrant.

The Ninth Circuit denied qualified immunity because it concluded that *Oliver v. United States*, 466 U.S. 170 (1984), clearly established plaintiff's front yard was curtilage entitled to the same degree of Fourth Amendment protection as the home, and therefore Stanton's warrantless entry was "presumptively unconstitutional." (App.21-22.) Yet, in *Oliver*, a case involving the "open fields" doctrine, the Court expressly declined to consider "the scope of the curtilage exception to the open fields doctrine or *the degree of Fourth Amendment protection afforded the curtilage, as opposed to the home itself.*" 466 U.S. at 180 n.11 (emphasis added).

Two years later, in *California v. Ciraolo*, 476 U.S. 207, 213-14 (1986), where the Court found that officers could validly look into a fenced yard from the

air without violating the Fourth Amendment, the Court held that depending on the nature and extent of public access, curtilage may be entitled to a lesser expectation of privacy, and thus a lesser degree of Fourth Amendment protection, than the residence itself. *Ciraolo* established – consistent with the Ninth Circuit and California cases discussed above – that merely declaring an area "curtilage" does not *ipso facto* entitle it to the same protection as the home; rather, this Court suggested that where the public may access the area in a particular way, the police may also do so without a warrant.

To be sure, this Court recently suggested that officers may violate the Fourth Amendment by physically entering a home's curtilage without a warrant for purposes other than to knock on the front door. *Florida v. Jardines*, No. 11-564, 2013 WL 1196577, at *4-5 ___ U.S. ___ (Mar. 26, 2013). But in 2008, when the incident here occurred, Officer Stanton could reasonably have believed his conduct was constitutional.

Moreover, even if *Welsh* and *Johnson* are construed as requiring additional exigencies besides hot pursuit of a misdemeanant to justify entering a home, a reasonable officer could conclude such circumstances existed here. *Welsh* did not foreclose the possibility that sufficient exigency could exist even where the offense is "minor," nor even define "minor" to include misdemeanors. *See Welsh*, 466 U.S. at 749 n.11, 753. Since *Welsh* involved a civil, non-jailable traffic offense, *id.* at 754, Stanton could reasonably conclude the jailable misdemeanor here was not "minor."

Stanton could also reasonably conclude additional exigencies justified entry. He was called to investigate a fight involving a baseball bat at 1:00 a.m., in a gang-ridden area where gang members were armed with guns and knives. (App.6; ER 1-2, 4.) Stanton saw the suspect, one of three men at the fight scene, cross the street upon seeing the police car and hurry toward plaintiff's apartment, ignoring the officer's commands to stop and concealing himself behind a six-foot-high, solid wood gate. (App.6-7, 17; ER 1, 5.) Stanton could reasonably believe the suspect might have been involved in the fight, might be carrying a concealed weapon, or might have entered the home to arm himself and then return to the street; or someone armed inside the residence might attempt to interfere with the arrest; or the suspect might escape. Since *Welsh* involved none of these circumstances, Stanton could reasonably believe the circumstances were exigent.

In short, no clearly established law put Officer Stanton on notice that he could not pursue a suspect he was attempting to arrest in public for a jailable misdemeanor, through a gate apparently used by the public to reach a residence's front door, particularly where the suspect might have been involved in violence moments before.

The Ninth Circuit's rejection of qualified immunity contravenes this Court's precedents. It conflicts with the decisions of other circuits applying qualified immunity, numerous decisions finding that "hot pursuit" of a fleeing misdemeanant justifies a warrantless home entry, and prior Ninth Circuit and California

decisions holding officers may enter areas of curtilage used by the public for ingress to a residence. Review is essential to again compel the Ninth Circuit to adhere to this Court's precedents, to resolve the confusion concerning warrantless arrests for misdemeanors and clarify application of qualified immunity in these circumstances.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

TIMOTHY T COATES
Counsel of Record
LILLIE HSU
GREINES, MARTIN, STEIN & RICHLAND LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261

PETER J. FERGUSON
FERGUSON, PRAET & SHERMAN
1631 East 18th Street
Santa Ana, California 92705-7101
Telephone: (714) 953-5300
Facsimile: (714) 953-1143

Counsel for Petitioner
Mike Stanton

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DRENDOLYN SIMS, *Plaintiff-Appellant*, v. MIKE STANTON, *Defendant-Appellee.*	No. 11-55401 D.C. No. 3:09-cv-01356-JM-WMC ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Southern District of California
Jeffrey T. Miller, Senior District Judge, Presiding

Argued and Submitted
August 8, 2012 – Pasadena, California

Filed December 3, 2012
Amended January 16, 2013

Before: Stephen Reinhardt, Barry G. Silverman, and Kim McLane Wardlaw, Circuit Judges.

Order;
Opinion by Judge Reinhardt

SUMMARY*

Civil Rights

The panel reversed the district court's summary judgment granting qualified immunity to a police officer and remanded in this action brought under 42 U.S.C. § 1983.

Plaintiff suffered serious injuries as a result of the officer's act of kicking down the front gate of her yard. She alleged that the officer violated her Fourth Amendment rights by his warrantless entry into the curtilage of her house during his pursuit of a suspect, who had committed at most a misdemeanor offense. The panel first held that plaintiff's yard was curtilage entitled to the same Fourth Amendment protections as her home. The panel held that the officer's actions amounted to an unconstitutional search and that the law at the time of the incident would have placed a reasonable officer on notice that his warrantless entry into the curtilage of a home constituted an unconstitutional search, which could not be excused in this case under the exigency or emergency exception to the warrant requirement.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

L. Marcel Stewart, San Diego, California, for Petitioner.

Peter J. Ferguson, Santa Ana, California, for Respondent.

ORDER

The opinion filed on December 3, 2012 is hereby amended as follows:

1. At page 11, lines 11-12 of the slip opinion, delete <the single misdemeanor of>.

2. At page 11, line 16 of the slip opinion, after <however,> insert < generally>.

3. At page 11, line 17 of the slip opinion, after the sentence ending < warrantless entry.> insert the following sentence <Nothing about the facts of this case warrants a departure from our general rule that an underlying misdemeanor offense justifies a warrantless entry in only "the 'rarest' cases." *Id.* (citations omitted).>.

4. At page 11, line 21 of the slip opinion, after <fleeing felon> insert <and the exigency of potential destruction of evidence by that felon>.

5. At page 11, lines 26-27 of the slip opinion, delete <The district court erroneously applied this precedent.>.

6. At page 12, line 10 of the slip opinion, after <any> and before < circumstances> delete <"rare">.

7. At page 12, lines 10-11 of the slip opinion, after <circumstances> delete <that would call for> and insert <making this one of those "rarest" cases justifying>.

8. At page 12, at line 11 of the slip opinion, between <exception to the> and <rule> insert <general>.

With these amendments, Judge Reinhardt, Silverman, and Wardlaw vote to deny the petition for rehearing and the suggestion for rehearing en banc. The full court was advised of the suggestion for rehearing en banc. No Judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc are DENIED. No future petitions for rehearing or petitions for rehearing en banc will be entertained.

OPINION

REINHARDT, Circuit Judge:

Drendolyn Sims suffered serious injuries as a result of officer Mike Stanton's act of kicking down the front gate to her small, enclosed yard. Sims was standing directly behind the gate when it swung open, knocking her down and rendering her temporarily unconscious, or at least incoherent, causing a laceration on her forehead and an injury to her shoulder. Stanton unreasonably believed that his warrantless entry into the curtilage of Sims's home

was justified by his pursuit of Nicholas Patrick, who had committed at most a misdemeanor offense by failing to stop for questioning in response to a police order. Sims filed an action in district court under 42 U.S.C. § 1983, alleging that her Fourth Amendment rights had been violated by Stanton's warrantless entry into her front yard and seeking damages for her injuries.

The district court found that Stanton was entitled to qualified immunity and granted his motion for summary judgment. Reviewing that decision de novo, we must determine whether Stanton violated Sims's Fourth Amendment right to be free from a warrantless entry into her front yard and whether the contours of that right were sufficiently established at the time that a reasonable officer would have been aware that his conduct was unconstitutional. We conclude that Stanton's actions amounted to an unconstitutional search. We hold that the law at the time of the incident would have placed a reasonable officer on notice that his warrantless entry into the curtilage of a home constituted an unconstitutional search, which could not be excused under the exigency or emergency exception to the warrant requirement. Stanton was, therefore, not entitled to qualified immunity.

BACKGROUND[1]

On May 27, 2008 at approximately one o'clock in the morning, Officer Stanton and his partner responded to a radio call regarding an "unknown disturbance" in the street involving a baseball bat in La Mesa, California. The officers were driving a marked car and wearing police uniforms. Stanton was familiar with the area as one "known for violence associated with the area gangs," and he "was also aware of gang members being armed with weapons such as guns and knives." Still, when the officers arrived, they observed nothing unusual.

The officers noticed three men walking in the street. Upon seeing the car, two of the men turned into a nearby apartment complex. The third, who turned out to be Patrick, crossed the street about twenty-five yards in front of the police car and walked quickly toward Sims's home, which was located in the same direction as the police car. Neither officer saw Patrick with a baseball bat or any other possible weapon. The officers had no information that would link Patrick to the disturbance. Nor did the officers observe any conduct on Patrick's part that would

---

[1] Although we review a district court's grant of summary judgment de novo, evaluating the facts in the light most favorable to the nonmoving party, most of the material facts in this case are not in dispute. Thus, we set forth the undisputed facts and note where a disputed fact affects the legal analysis that follows. *See LaLonde v. Cnty. of Riverside*, 204 F.3d 947, 950 n.3 (9th Cir. 2000).

suggest that he had been involved in the disturbance that they had been called to investigate.

According to Stanton's version of the facts, he exited the patrol car, announced "police," and ordered Patrick to stop multiple times in a voice that was loud enough that all persons in the area would have heard his commands. Whether Patrick heard the commands or not, he did not stop. Instead, he entered the gate to Sims's front yard and the gate shut behind him. Believing that Patrick was disobeying his lawful order (a misdemeanor offense under California Penal Code § 148[2]) and "fearing for [his] safety," Stanton made a "split-second decision" to kick open the gate to Sims's yard. Sims was standing behind the gate when it flew open, striking her and sending her into the front stairs. She was temporarily knocked unconscious, or at least became incoherent, as a result of the blow and sustained a laceration on her forehead, an injury to her shoulder, and was taken to the hospital.

The gate Stanton kicked open is part of a fence made of "sturdy, solid wood" that is more than six feet tall, enclosing the front yard to Sims's home. Sims lives in a manufactured home with a small front yard that abuts the house. She states that she "enjoy[s] a

---

[2] California Penal Code § 148 makes "willfully resist[ing], delay[ing], or obstruct[ing]" an officer "in the discharge or attempt to discharge any duty of his or her office" a misdemeanor offense punishable by up to one year and by a fine of up to $1000. § 148; *see also In re M.M.*, 54 Cal. 4th 530, 533 (2012) (§ 148 is a misdemeanor offense).

high level of privacy in [her] front yard." Her fence, which was built for "privacy and protection," ensures that her outdoor space is "completely secluded" and cannot be seen by someone standing outside the gate. Additionally, the front yard is used for talking with friends, as Sims was doing on the evening of the incident, and for storing her wheelchair, which she keeps parked inside the fence.

Sims's complaint against Stanton alleged unconstitutional arrest, search, excessive force, and additional state law tort claims. Stanton moved for summary judgment, which the district court granted, finding that (1) Stanton did not use excessive force; (2) exigency and a lesser expectation of privacy in the curtilage surrounding Sims's home justified the warrantless entry; and (3) no clearly established law put Stanton on notice that his conduct was unconstitutional and therefore he was entitled to qualified immunity. Sims appeals the district court's decision on her unconstitutional search claim and the grant of qualified immunity to Stanton.[3]

---

[3] After dismissing Sims's federal claims, the district court declined to exercise supplemental jurisdiction over her state law claims and dismissed them without prejudice. Because we reverse the dismissal of Sims's federal claims, we also reverse the dismissal of Sims's state law claims.

DISCUSSION

The Fourth Amendment prohibits officers from entering an enclosed front yard – curtilage – without a warrant, to the same extent that it prohibits them from entering a home. *See United States v. Perea-Rey,* 680 F.3d 1179, 1184 (9th Cir. 2012). Thus, we first must determine whether Sims's front yard was curtilage. If so, Stanton's warrantless entry is unconstitutional unless it meets the requirements for an exception to the warrant rule.

We next review the facts presented to the district court to determine whether Stanton's warrantless entry meets either the exigency or emergency exceptions to the warrant requirement. *Hopkins v. Bonvicino,* 573 F.3d 752, 763 (9th Cir. 2009). Because both exceptions turn on the seriousness of the underlying offense, we ultimately conclude that Stanton's warrantless entry cannot be justified by his pursuit of Patrick, who committed, at most, only a misdemeanor. *See United States v. Johnson,* 256 F.3d 895, 908 n.6 (9th Cir. 2001) (en banc) (exigency exception); *LaLonde,* 204 F.3d at 958 n.16 (emergency exception).

Curtilage

Before analyzing the exceptions to the warrant requirement, it must be determined whether Sims's yard is curtilage and therefore entitled to the same Fourth Amendment protections as her home.

It is well-established that "[t]he presumptive protection accorded people at home extends to outdoor areas traditionally known as 'curtilage' – areas that, like the inside of a house, harbor the intimate activity associated with the sanctity of a person's home and the privacies of life." *United States v. Struckman,* 603 F.3d 731, 738 (9th Cir. 2010) (quoting *United States v. Dunn,* 480 U.S. 294, 300 (1987)) (internal quotations and alterations omitted). "Because the curtilage is part of the home, searches and seizures in the curtilage without a warrant are also presumptively unreasonable." *Perea-Rey,* 680 F.3d at 1184 (citing *Oliver v. United States,* 466 U.S. 170, 180 (1984)). The district court recognized that Sims's front yard was curtilage, but erred in finding that its status as curtilage entitled Sims to a "lesser expectation of privacy . . . as opposed to the home itself."

Sims's small, enclosed, residential yard is quintessential curtilage. "[A] small, enclosed yard adjacent to a home in a residential neighborhood [] is unquestionably such a 'clearly marked' area 'to which the activity of home life extends,' and so is 'curtilage' subject to the Fourth Amendment protection." *Struckman,* 603 F.3d at 739 (quoting *Oliver,* 466 U.S. at 182 n.12). Because Sims's front yard obviously meets the definition of curtilage, the district court did not need to analyze it under the factors announced by the Supreme Court in *United States v. Dunn.* 480 U.S. at 294. These factors serve as "useful analytical tools" to ensure that Fourth Amendment protections extend to areas that are much further from the house

but that still should be "treated as the home itself." *Id.* at 300-01. Here, however, the factors are unnecessary because it is "easily understood from our daily experience" that Sims's yard is curtilage.[4] *Oliver,* 466 U.S. at 182 n.12; *see also Struckman,* 603 F.3d at 739.

Because curtilage is protected to the same degree as the home, the district court erred in applying a "totality of the circumstances" balancing inquiry that justified the warrantless intrusion based in part on a "lesser expectation of privacy" in one's front yard as compared to one's home. We hold that the Fourth Amendment protects Sims's yard, a mere extension of the home itself, from warrantless search. *Perea-Rey,*

---

[4] Of course, applying the *Dunn* factors to Sims's yard leads to the same result. The first factor, "the proximity of the area claimed to be curtilage to the home," *id.* at 301, is met because her front yard is adjacent to her home and extends only a short distance. The second factor, whether the area is "included within an enclosure surrounding the home," *id.*, is met because a tall wooden fence encloses both her front yard and her home. Sims meets the third factor, "the nature of the uses to which the area is put," *id.*, because Sims stated that she enjoyed a high degree of privacy in her front yard, that she used it to store her wheelchair, and that she entertains guests there. The final factor, "steps taken by the resident to protect the area from observation by people passing by," *id.*, is met because the gate that Stanton kicked in was a "sturdy, solid wood," six-foot-high fence with narrow slats between the planks of wood.

Stanton's argument that because he could see the front door it was not entitled to the same expectation of privacy is beside the point. The warrantless entry was to Sims's yard, which Stanton obviously could not see prior to kicking in the front gate; if he could have, he would have known that Sims was standing behind it.

680 F.3d at 1184. Stanton's warrantless entry, therefore, was presumptively unconstitutional. *Struckman,* 603 F.3d at 743.

Exceptions To The Warrant Requirement

When the warrantless search is to home or curtilage, we recognize two exceptions to the warrant requirement: exigency and emergency. *Hopkins,* 573 F.3d at 763. "These exceptions are narrow and their boundaries are rigorously guarded to prevent any expansion that would unduly interfere with the sanctity of the home." *Id.* at 763. The exigency exception assists officers in the performance of their law enforcement function. It permits police to commit a warrantless entry where "necessary to prevent . . . the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." *Id.* at 763 (citing *United States v. McConney,* 728 F.2d 1195, 1199 (9th Cir. 1984) (en banc)). The emergency exception, in contrast, seeks to ensure that officers can carry out their duties safely while at the same time ensuring the safety of members of the public. It applies when officers "have an objectively reasonable basis for concluding that there is an immediate need to protect others or themselves from serious harm." *Id.* at 764 (citing *United States v. Snipe,* 515 F.3d 947, 951-52 (9th Cir. 2008)) (internal emphasis omitted).

Under either exception, our review of whether the circumstances justified the warrantless entry

considers the seriousness, or lack thereof, of the underlying offense. *Johnson,* 256 F.3d at 908 n.6 (exigency exception); *LaLonde,* 204 F.3d at 958 n.16 (emergency exception). The district court erroneously granted summary judgment to Stanton, despite clear precedent that precludes the finding of an exception to the warrant requirement when the circumstances turn on only a misdemeanor offense. *Johnson,* 256 F.3d at 908 n.6; *LaLonde,* 204 F.3d at 958 n.16.

Exigency Exception

Stanton attempts to show that exigent circumstances justified his warrantless entry, specifically that Patrick would have escaped arrest. The burden to show exigent circumstances rests on the officer, who must "point[ ] to some real immediate and serious consequences if he postponed action to get a warrant." *Welsh v. Wisconsin,* 466 U.S. 740, 749-50, 751 (1984) (internal quotation marks and citation omitted). We have recognized circumstances that justify a warrantless entry to prevent "the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." *Hopkins,* 573 F.3d at 763 (quoting *McConney,* 728 F.2d at 1199).

Not every law enforcement action, however, justifies an exception to the warrant requirement. The recognition that sometimes law enforcement needs take precedence must be balanced against the Fourth Amendment protections against unreasonable searches.

We have given officers clear guidance on how to approach the balance between "a person's right to be free from warrantless intrusions" and "law enforcement's interest in apprehending a fleeing suspect." *Johnson,* 256 F.3d at 908 n.6. We have said, "[i]n situations where an officer is truly in hot pursuit and the underlying offense is a felony, the Fourth Amendment usually yields," but "in situations where the underlying offense is only a misdemeanor, law enforcement must yield to the Fourth Amendment in all but the 'rarest' cases." *Id.* (citations omitted). Stanton offers nothing to show why in this case the Fourth Amendment should yield.

Stanton does not argue that this case involves probable cause for any crime more serious than disobeying an officer's order to stop.[5] We do not doubt that Stanton believed that Patrick might escape arrest if he did not follow him into Sims's front yard. The possible escape of a fleeing misdemeanant, assuming Patrick had been fleeing, is not, however, generally, a serious enough consequence to justify a warrantless entry. Nothing about the facts of this case warrants a departure from our general rule that an underlying misdemeanor offense justifies a

---

[5] Whether Stanton had probable cause to believe that Patrick had violated California Penal Code § 148 is fiercely debated by the parties. We do not need to decide this question, because, even if Stanton had probable cause to believe that Patrick violated § 148, that violation would at most be a misdemeanor offense.

warrantless entry in only "the 'rarest' cases." *Id.* (citations omitted). The precedent relied on by the district court, *United States v. Santana,* which held that a "suspect may not defeat an arrest which has been set in motion in a public place . . . by the expedient of escaping to a private place," involved a fleeing felon and the exigency of potential destruction of evidence by that felon. 427 U.S. 38, 43 (1976). Since *Santana,* the Supreme Court and our court have made it clear that the exigency exception to the warrant requirement generally applies only to a fleeing felon not to a fleeing misdemeanant. *Welsh,* 466 U.S. at 750; *Johnson,* 256 F.3d at 908 n.6.

The warrantless intrusion is particularly egregious in this case because Stanton violated the Fourth Amendment rights of an uninvolved person, Sims. *See Johnson,* 256 F.3d at 909. Stanton could have knocked on the door and asked Sims for permission to enter and speak with, or arrest, Patrick. Knocking on the door would still not have justified a warrantless entry, but at the very least, with the warning of a knock, Sims might have been able to move away from behind the gate before Stanton kicked it open. In any event, the record before us does not reveal any circumstances making this one of those "rarest" cases justifying an exception to the general rule that "where the underlying offense is only a misdemeanor, law enforcement must yield to the Fourth Amendment." *Johnson,* 256 F.3d at 908 n.6.

Emergency Exception

Stanton asserts that he pursued Patrick into Sims's curtilage because he feared for his own safety. To establish that the circumstances gave rise to an emergency situation, Stanton must show an "objectively reasonable basis for fearing that violence was imminent." *Ryburn v. Huff,* 132 S. Ct. 987, 992 (2012). As in the case of an exigency exception, an "officer['s] assertion of a potential threat to [his] safety must be viewed in the context of the underlying offense." *LaLonde,* 204 F.3d at 958 n. 16.[6] Where the threat is to the officer's safety, we observe that "[o]ne suspected of committing a minor offense would not likely resort to desperate measures to avoid arrest and prosecution." *Id.* (quoting *United States v. George,* 883 F.2d 1407, 1413 n.3 (9th Cir. 1989)). Reviewing the constitutionality of the warrantless entry de novo, we conclude that the record does not support a finding of an emergency after Patrick entered Sims's fenced yard.

Stanton was called to investigate a disturbance involving a baseball bat at one o'clock in the morning. Although Stanton knew the area as one associated with gangs whose members may be armed, he had no

---

[6] Stanton attempts to distinguish *LaLonde* on the ground that it involved the warrantless entry into a home, rather than a front yard. This distinction is meaningless because the yard is curtilage and therefore entitled to the same protection as the home under the Fourth Amendment. *See* discussion *supra,* pp. 9-10.

information tying Patrick to the reported disturbance. He did not see Patrick carrying a baseball bat or any other weapon.[7] The only facts in the record suggesting suspicious behavior were that Stanton observed Patrick "cross the street and quickly walk/run toward" Sims's home, and that after he ordered Patrick to stop, Patrick "looked directly at [Stanton], ignored [his] lawful orders and quickly went through a front gate." Once Patrick fled into Sims's front yard, without signaling in any way that he would engage Stanton, return with a weapon, or otherwise threaten him with violence, there was simply no evidence of imminent danger to the officer or anyone else.

The circumstances of this case stand in stark contrast to the facts that supported the officer's reasonable belief in *Ryburn* that danger could be imminent. In *Ryburn,* four officers went to high school student Vincent Huff's home to investigate threats that he was going to "shoot up" the school. 132 S. Ct. at 988. The officers testified to facts that were specific to Mrs. Huff and her son that "led them to be concerned for their own safety and for the safety of other persons in the residence." *Id.* at 990. In addition to the reported threat of a school shooting, these facts included:

> the unusual behavior of the parents in not answering the door or the telephone; the fact

---

[7] When Patrick was eventually stopped, he had no weapon on his person.

> that Mrs. Huff did not inquire about the reason for their visit or express concern that they were investigating her son; the fact that she hung up the telephone on the officer; the fact that she refused to tell them whether there were guns in the house; and finally, the fact that she ran back into the house while being questioned.

Id. Based on the suspected presence of weapons in the home of a teenager who had threatened to commit a violent felony by the use of deadly weapons, those officers had an "objectively reasonable basis" to fear that "family members or the officers themselves were in danger." *Id.* at 990. Here, Stanton attempts to justify his fear that Patrick threatened his safety, by pointing to the report of an incident involving a bat and his belief that Sims's neighborhood was a high-crime area. However, none of the factors: Stanton's belief that Patrick committed a misdemeanor by failing to heed his order, the original call to the police regarding the disturbance, the presence of gangs and the crime rate in the neighborhood, nor a combination of all three is sufficient to constitute an "emergency" that justified breaking down a closed gate and entering without a warrant.

Stanton described Sims's neighborhood as "an area known for violence associated with the area gangs," and stated that he "was also aware of gang members being armed with weapons such as guns and knives." Based on the facts which he knew about the neighborhood and the report of a disturbance in

the street, Stanton speculates that Patrick may have been carrying a concealed weapon, that he may have gone into Sims's home in order to arm himself and then return to the street, or that someone armed inside Sims's home might have attempted to interfere with Patrick's arrest. Without some particularized facts relating to Patrick, Stanton's inferences are too generalized and speculative to provide an "objectively reasonable basis" for fearing that violence might be imminent, *see Ryburn,* 132 S. Ct. at 992, and nothing in the record reveals an emergency that justifies the warrantless entry of a home's curtilage in pursuit of a misdemeanant.

A contrary conclusion would undermine Fourth Amendment protections for individuals residing, often not by choice, in poor neighborhoods where crime is more prevalent than in wealthy communities. As we have said in the context of drawing inferences from neighborhood characteristics to support reasonable suspicion of criminal activity, "[w]e must be particularly careful to ensure that a 'high crime' area factor is not used with respect to entire neighborhoods or communities in which members of minority groups regularly go about their daily business." *United States v. Montero-Camargo,* 208 F.3d 1122, 1138 (9th Cir. 2000). We do not imply that general factors, such as the time of day, the nature of the call, or the officers' prior experience with gangs and violence in the neighborhood, are of no relevance to an officer's fear that violence may occur. To justify an emergency exception to the warrant requirement,

however, these factors must be combined with particularized evidence that the person being pursued or the home being investigated poses a threat to the officer's or the public's safety. This was not the case here: Patrick entered Sims's home, where he was apparently welcome, and gave Stanton no reason to believe that his or anyone else's safety would be in danger.

In sum, Stanton's "assertion of a potential threat to [his] safety," based on generalized assumptions concerning the neighborhood or its residents, rather than specific facts relating to the individuals involved, did not justify an exception to the warrant requirement when viewed "in the context of the underlying offense," at most a misdemeanor. *LaLonde,* 204 F.3d at 958 n.16.

Qualified Immunity

In a claim for civil damages under § 1983, to avoid the bar of qualified immunity, the plaintiff must show that the officer violated a constitutional right and that the right was "clearly established" at the time of the occurrence. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). The determination whether a right was clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz,* 533 U.S. 194, 201 (2001). The individual circumstances of the case do not, however, provide a basis for qualified immunity if "the unlawfulness was apparent in light of

preexisting law." *Jensen v. City of Oxnard,* 145 F.3d 1078, 1085 (9th Cir. 1998) (internal citation omitted). "Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding." *Hope v. Pelzer,* 536 U.S. 730, 741 (2002). The Supreme Court has made clear that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* Therefore, the "salient question" is "whether the state of the law" in 2008 gave Stanton "fair warning" that his warrantless entry was unconstitutional. *Id.*

Contrary to the district court's findings, a reasonable officer should have known that the warrantless entry into Sims's front yard violated the Fourth Amendment because clearly established law afforded notice that Sims's front yard was curtilage and, was therefore, protected to the same extent as her home. Established law also afforded notice that a warrantless entry into a home cannot be justified by pursuit of a suspected misdemeanant except in the rarest of circumstances. Since well before the incident occurred in 2008, Supreme Court law and the precedent of this court had established that, on the basis of the record before us, Stanton's conduct was clearly unconstitutional.

A front yard has been considered curtilage since 1984 when the Supreme Court decided *Oliver v. United States.* 466 U.S. at 170. A front yard enclosed by a six-foot-tall, wooden fence, in which private

items are stored and social interactions take place is the paradigmatic example of curtilage and is both "clearly marked" and "easily understood." *Id.* at 182 n.12. Thus, Stanton should have known that his warrantless entry was presumptively unconstitutional.

This presumption may be overcome only by circumstances justifying either an exigency or emergency exception. Stanton attempts to show exigent circumstances by pointing to the risk that Patrick might escape. It should have been clear to Stanton, however, from Supreme Court and Ninth Circuit decisions that law enforcement actions involving a misdemeanor offense will rarely, if ever, justify a warrantless entry. *Welsh,* 466 U.S. at 750 (clearly established since 1984); *Johnson,* 256 F.3d at 908 (clearly established since 2001). That *Welsh* leaves open the possibility for a "rare" exception to this rule does not mean that the rule was not clearly established at the time and does not change our qualified immunity analysis. Here, nothing in the record suggests that this case was "rare" in any respect.

Stanton also contends that the emergency exception justified his warrantless entry by asserting that he feared for his safety. The circumstances of this case belie the reasonableness of that fear. The non-serious nature of the underlying offense, failure to heed an officer's command, precludes us from finding, on the record before us, that an emergency exception was applicable. *LaLonde,* 204 F.3d at 958 (clearly established since 2000). So, too, does the lack of any reasonable basis for any specific concern that the

individuals involved were likely to engage in any act of violence. Accordingly, Stanton is not entitled to qualified immunity.

For the reasons stated above, the district court's order granting summary judgment in favor of the defendant is **REVERSED** and **REMANDED**.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DRENDOLYN SIMS, *Plaintiff-Appellant*, v. MIKE STANTON, *Defendant-Appellee.*	No. 11-55401 D.C. No. 3:09-cv-01356-JM-WMC OPINION

Appeal from the United States District Court
for the Southern District of California
Jeffrey T. Miller, Senior District Judge, Presiding

Argued and Submitted
August 8, 2012 – Pasadena, California

Filed December 3, 2012

Before: Stephen Reinhardt, Barry G. Silverman, and Kim McLane Wardlaw, Circuit Judges.

Opinion by Judge Reinhardt

SUMMARY*

Civil Rights

The panel reversed the district court's summary judgment granting qualified immunity to a police officer and remanded in this action brought under 42 U.S.C. § 1983.

Plaintiff suffered serious injuries as a result of the officer's act of kicking down the front gate of her yard. She alleged that the officer violated her Fourth Amendment rights by his warrantless entry into the curtilage of her house during his pursuit of a suspect, who had committed at most a misdemeanor offense. The panel first held that plaintiff's yard was curtilage entitled to the same Fourth Amendment protections as her home. The panel held that the officer's actions amounted to an unconstitutional search and that the law at the time of the incident would have placed a reasonable officer on notice that his warrantless entry into the curtilage of a home constituted an unconstitutional search, which could not be excused in this case under the exigency or emergency exception to the warrant requirement.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

L. Marcel Stewart, San Diego, California, for Petitioner.

Peter J. Ferguson, Santa Ana, California, for Respondent.

OPINION

REINHARDT, Circuit Judge:

Drendolyn Sims suffered serious injuries as a result of officer Mike Stanton's act of kicking down the front gate to her small, enclosed yard. Sims was standing directly behind the gate when it swung open, knocking her down and rendering her temporarily unconscious, or at least incoherent, causing a laceration on her forehead and an injury to her shoulder. Stanton unreasonably believed that his warrantless entry into the curtilage of Sims's home was justified by his pursuit of Nicholas Patrick, who had committed at most a misdemeanor offense by failing to stop for questioning in response to a police order. Sims filed an action in district court under 42 U.S.C. § 1983, alleging that her Fourth Amendment rights had been violated by Stanton's warrantless entry into her front yard and seeking damages for her injuries.

The district court found that Stanton was entitled to qualified immunity and granted his motion for summary judgment. Reviewing that decision de novo, we must determine whether Stanton violated

Sims's Fourth Amendment right to be free from a warrantless entry into her front yard and whether the contours of that right were sufficiently established at the time that a reasonable officer would have been aware that his conduct was unconstitutional. We conclude that Stanton's actions amounted to an unconstitutional search. We hold that the law at the time of the incident would have placed a reasonable officer on notice that his warrantless entry into the curtilage of a home constituted an unconstitutional search, which could not be excused under the exigency or emergency exception to the warrant requirement. Stanton was, therefore, not entitled to qualified immunity.

BACKGROUND[1]

On May 27, 2008 at approximately one o'clock in the morning, Officer Stanton and his partner responded to a radio call regarding an "unknown disturbance" in the street involving a baseball bat in La Mesa, California. The officers were driving a marked car and wearing police uniforms. Stanton was familiar with the area as one "known for violence

---

[1] Although we review a district court's grant of summary judgment de novo, evaluating the facts in the light most favorable to the nonmoving party, most of the material facts in this case are not in dispute. Thus, we set forth the undisputed facts and note where a disputed fact affects the legal analysis that follows. *See LaLonde v. Cnty. of Riverside*, 204 F.3d 947, 950 n.3 (9th Cir. 2000).

associated with the area gangs," and he "was also aware of gang members being armed with weapons such as guns and knives." Still, when the officers arrived, they observed nothing unusual.

The officers noticed three men walking in the street. Upon seeing the car, two of the men turned into a nearby apartment complex. The third, who turned out to be Patrick, crossed the street about twenty-five yards in front of the police car and walked quickly toward Sims's home, which was located in the same direction as the police car. Neither officer saw Patrick with a baseball bat or any other possible weapon. The officers had no information that would link Patrick to the disturbance. Nor did the officers observe any conduct on Patrick's part that would suggest that he had been involved in the disturbance that they had been called to investigate.

According to Stanton's version of the facts, he exited the patrol car, announced "police," and ordered Patrick to stop multiple times in a voice that was loud enough that all persons in the area would have heard his commands. Whether Patrick heard the commands or not, he did not stop. Instead, he entered the gate to Sims's front yard and the gate shut behind him. Believing that Patrick was disobeying his lawful order (a misdemeanor offense under California Penal Code § 148[2]) and "fearing for [his] safety," Stanton made a

---

[2] California Penal Code § 148 makes "willfully resist[ing], delay[ing], or obstruct[ing]" an officer "in the discharge or attempt to discharge any duty of his or her office" a misdemeanor

(Continued on following page)

"split-second decision" to kick open the gate to Sims's yard. Sims was standing behind the gate when it flew open, striking her and sending her into the front stairs. She was temporarily knocked unconscious, or at least became incoherent, as a result of the blow and sustained a laceration on her forehead, an injury to her shoulder, and was taken to the hospital.

The gate Stanton kicked open is part of a fence made of "sturdy, solid wood" that is more than six feet tall, enclosing the front yard to Sims's home. Sims lives in a manufactured home with a small front yard that abuts the house. She states that she "enjoy[s] a high level of privacy in [her] front yard." Her fence, which was built for "privacy and protection," ensures that her outdoor space is "completely secluded" and cannot be seen by someone standing outside the gate. Additionally, the front yard is used for talking with friends, as Sims was doing on the evening of the incident, and for storing her wheelchair, which she keeps parked inside the fence.

Sims's complaint against Stanton alleged unconstitutional arrest, search, excessive force, and additional state law tort claims. Stanton moved for summary judgment, which the district court granted, finding that (1) Stanton did not use excessive force; (2) exigency and a lesser expectation of privacy in the

---

offense punishable by up to one year and by a fine of up to $1000. § 148; *see also In re M.M.*, 54 Cal. 4th 530, 533 (2012) (§ 148 is a misdemeanor offense).

curtilage surrounding Sims's home justified the warrantless entry; and (3) no clearly established law put Stanton on notice that his conduct was unconstitutional and therefore he was entitled to qualified immunity. Sims appeals the district court's decision on her unconstitutional search claim and the grant of qualified immunity to Stanton.[3]

DISCUSSION

The Fourth Amendment prohibits officers from entering an enclosed front yard – curtilage – without a warrant, to the same extent that it prohibits them from entering a home. *See United States v. Perea-Rey,* 680 F.3d 1179, 1184 (9th Cir. 2012). Thus, we first must determine whether Sims's front yard was curtilage. If so, Stanton's warrantless entry is unconstitutional unless it meets the requirements for an exception to the warrant rule.

We next review the facts presented to the district court to determine whether Stanton's warrantless entry meets either the exigency or emergency exceptions to the warrant requirement. *Hopkins v. Bonvicino,* 573 F.3d 752, 763 (9th Cir. 2009). Because both exceptions turn on the seriousness of the underlying offense, we ultimately conclude that Stanton's

---

[3] After dismissing Sims's federal claims, the district court declined to exercise supplemental jurisdiction over her state law claims and dismissed them without prejudice. Because we reverse the dismissal of Sims's federal claims, we also reverse the dismissal of Sims's state law claims.

warrantless entry cannot be justified by his pursuit of Patrick, who committed, at most, only a misdemeanor. *See United States v. Johnson,* 256 F.3d 895, 908 n.6 (9th Cir. 2001) (en banc) (exigency exception); *LaLonde,* 204 F.3d at 958 n.16 (emergency exception).

Curtilage

Before analyzing the exceptions to the warrant requirement, it must be determined whether Sims's yard is curtilage and therefore entitled to the same Fourth Amendment protections as her home.

It is well-established that "[t]he presumptive protection accorded people at home extends to outdoor areas traditionally known as 'curtilage' – areas that, like the inside of a house, harbor the intimate activity associated with the sanctity of a person's home and the privacies of life." *United States v. Struckman,* 603 F.3d 731, 738 (9th Cir. 2010) (quoting *United States v. Dunn,* 480 U.S. 294, 300 (1987)) (internal quotations and alterations omitted). "Because the curtilage is part of the home, searches and seizures in the curtilage without a warrant are also presumptively unreasonable." *Perea-Rey,* 680 F.3d at 1184 (citing *Oliver v. United States,* 466 U.S. 170, 180 (1984)). The district court recognized that Sims's front yard was curtilage, but erred in finding that its status as curtilage entitled Sims to a "lesser expectation of privacy . . . as opposed to the home itself."

Sims's small, enclosed, residential yard is quintessential curtilage. "[A] small, enclosed yard adjacent to a home in a residential neighborhood [] is unquestionably such a 'clearly marked' area 'to which the activity of home life extends,' and so is 'curtilage' subject to the Fourth Amendment protection." *Struckman*, 603 F.3d at 739 (quoting *Oliver*, 466 U.S. at 182 n.12). Because Sims's front yard obviously meets the definition of curtilage, the district court did not need to analyze it under the factors announced by the Supreme Court in *United States v. Dunn*. 480 U.S. at 294. These factors serve as "useful analytical tools" to ensure that Fourth Amendment protections extend to areas that are much further from the house but that still should be "treated as the home itself." *Id.* at 300-01. Here, however, the factors are unnecessary because it is "easily understood from our daily experience" that Sims's yard is curtilage.[4] *Oliver*, 466 U.S. at 182 n.12; *see also Struckman*, 603 F.3d at 739.

---

[4] Of course, applying the *Dunn* factors to Sims's yard leads to the same result. The first factor, "the proximity of the area claimed to be curtilage to the home," *id.* at 301, is met because her front yard is adjacent to her home and extends only a short distance. The second factor, whether the area is "included within an enclosure surrounding the home," *id.*, is met because a tall wooden fence encloses both her front yard and her home. Sims meets the third factor, "the nature of the uses to which the area is put," *id.*, because Sims stated that she enjoyed a high degree of privacy in her front yard, that she used it to store her wheelchair, and that she entertains guests there. The final factor, "steps taken by the resident to protect the area from observation by people passing by," *id.*, is met because the gate that Stanton

(Continued on following page)

Because curtilage is protected to the same degree as the home, the district court erred in applying a "totality of the circumstances" balancing inquiry that justified the warrantless intrusion based in part on a "lesser expectation of privacy" in one's front yard as compared to one's home. We hold that the Fourth Amendment protects Sims's yard, a mere extension of the home itself, from warrantless search. *Perea-Rey,* 680 F.3d at 1184. Stanton's warrantless entry, therefore, was presumptively unconstitutional. *Struckman,* 603 F.3d at 743.

Exceptions To The Warrant Requirement

When the warrantless search is to home or curtilage, we recognize two exceptions to the warrant requirement: exigency and emergency. *Hopkins,* 573 F.3d at 763. "These exceptions are narrow and their boundaries are rigorously guarded to prevent any expansion that would unduly interfere with the sanctity of the home." *Id.* at 763. The exigency exception assists officers in the performance of their law enforcement function. It permits police to commit a

---

kicked in was a "sturdy, solid wood," six-foot-high fence with narrow slats between the planks of wood.

Stanton's argument that because he could see the front door it was not entitled to the same expectation of privacy is beside the point. The warrantless entry was to Sims's yard, which Stanton obviously could not see prior to kicking in the front gate; if he could have, he would have known that Sims was standing behind it.

warrantless entry where "necessary to prevent . . . the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." *Id.* at 763 (citing *United States v. McConney,* 728 F.2d 1195, 1199 (9th Cir. 1984) (en banc)). The emergency exception, in contrast, seeks to ensure that officers can carry out their duties safely while at the same time ensuring the safety of members of the public. It applies when officers "have an objectively reasonable basis for concluding that there is an immediate need to protect others or themselves from serious harm." *Id.* at 764 (citing *United States v. Snipe,* 515 F.3d 947, 951-52 (9th Cir. 2008)) (internal emphasis omitted).

Under either exception, our review of whether the circumstances justified the warrantless entry considers the seriousness, or lack thereof, of the underlying offense. *Johnson,* 256 F.3d at 908 n.6 (exigency exception); *LaLonde,* 204 F.3d at 958 n.16 (emergency exception). The district court erroneously granted summary judgment to Stanton, despite clear precedent that precludes the finding of an exception to the warrant requirement when the circumstances turn on only a misdemeanor offense. *Johnson,* 256 F.3d at 908 n.6; *LaLonde,* 204 F.3d at 958 n.16.

Exigency Exception

Stanton attempts to show that exigent circumstances justified his warrantless entry, specifically that Patrick would have escaped arrest. The burden

to show exigent circumstances rests on the officer, who must "point[ ] to some real immediate and serious consequences if he postponed action to get a warrant." *Welsh v. Wisconsin,* 466 U.S. 740, 749-50, 751 (1984) (internal quotation marks and citation omitted). We have recognized circumstances that justify a warrantless entry to prevent "the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." *Hopkins,* 573 F.3d at 763 (quoting *McConney,* 728 F.2d at 1199).

Not every law enforcement action, however, justifies an exception to the warrant requirement. The recognition that sometimes law enforcement needs take precedence must be balanced against the Fourth Amendment protections against unreasonable searches. We have given officers clear guidance on how to approach the balance between "a person's right to be free from warrantless intrusions" and "law enforcement's interest in apprehending a fleeing suspect." *Johnson,* 256 F.3d at 908 n.6. We have said, "[i]n situations where an officer is truly in hot pursuit and the underlying offense is a felony, the Fourth Amendment usually yields," but "in situations where the underlying offense is only a misdemeanor, law enforcement must yield to the Fourth Amendment in all but the 'rarest' cases." *Id.* (citations omitted). Stanton offers nothing to show why in this case the Fourth Amendment should yield.

Stanton does not argue that this case involves probable cause for any crime more serious than the

single misdemeanor of disobeying an officer's order to stop.[5] We do not doubt that Stanton believed that Patrick might escape arrest if he did not follow him into Sims's front yard. The possible escape of a fleeing misdemeanant, assuming Patrick had been fleeing, is not, however, a serious enough consequence to justify a warrantless entry. The precedent relied on by the district court, *United States v. Santana,* which held that a "suspect may not defeat an arrest which has been set in motion in a public place . . . by the expedient of escaping to a private place," involved a fleeing felon. 427 U.S. 38, 43 (1976). Since *Santana,* the Supreme Court and our court have made it clear that the exigency exception to the warrant requirement generally applies only to a fleeing felon not to a fleeing misdemeanant. *Welsh,* 466 U.S. at 750; *Johnson,* 256 F.3d at 908 n.6. The district court erroneously applied this precedent.

The warrantless intrusion is particularly egregious in this case because Stanton violated the Fourth Amendment rights of an uninvolved person, Sims. *See Johnson,* 256 F.3d at 909. Stanton could have knocked on the door and asked Sims for permission to enter and speak with, or arrest, Patrick.

---

[5] Whether Stanton had probable cause to believe that Patrick had violated California Penal Code § 148 is fiercely debated by the parties. We do not need to decide this question, because, even if Stanton had probable cause to believe that Patrick violated § 148, that violation would at most be a misdemeanor offense.

Knocking on the door would still not have justified a warrantless entry, but at the very least, with the warning of a knock, Sims might have been able to move away from behind the gate before Stanton kicked it open. In any event, the record before us does not reveal any "rare" circumstances that would call for an exception to the rule that "where the underlying offense is only a misdemeanor, law enforcement must yield to the Fourth Amendment." *Johnson,* 256 F.3d at 908 n.6.

Emergency Exception

Stanton asserts that he pursued Patrick into Sims's curtilage because he feared for his own safety. To establish that the circumstances gave rise to an emergency situation, Stanton must show an "objectively reasonable basis for fearing that violence was imminent." *Ryburn v. Huff,* 132 S. Ct. 987, 992 (2012). As in the case of an exigency exception, an "officer['s] assertion of a potential threat to [his] safety must be viewed in the context of the underlying offense." *LaLonde,* 204 F.3d at 958 n.16.[6] Where the threat is to the officer's safety, we observe that "[o]ne suspected of committing a minor offense would not likely

---

[6] Stanton attempts to distinguish *LaLonde* on the ground that it involved the warrantless entry into a home, rather than a front yard. This distinction is meaningless because the yard is curtilage and therefore entitled to the same protection as the home under the Fourth Amendment. *See* discussion *supra,* pp. 7-9.

resort to desperate measures to avoid arrest and prosecution." *Id.* (quoting *United States v. George,* 883 F.2d 1407, 1413 n.3 (9th Cir. 1989)). Reviewing the constitutionality of the warrantless entry de novo, we conclude that the record does not support a finding of an emergency after Patrick entered Sims's fenced yard.

Stanton was called to investigate a disturbance involving a baseball bat at one o'clock in the morning. Although Stanton knew the area as one associated with gangs whose members may be armed, he had no information tying Patrick to the reported disturbance. He did not see Patrick carrying a baseball bat or any other weapon.[7] The only facts in the record suggesting suspicious behavior were that Stanton observed Patrick "cross the street and quickly walk/run toward" Sims's home, and that after he ordered Patrick to stop, Patrick "looked directly at [Stanton], ignored [his] lawful orders and quickly went through a front gate." Once Patrick fled into Sims's front yard, without signaling in any way that he would engage Stanton, return with a weapon, or otherwise threaten him with violence, there was simply no evidence of imminent danger to the officer or anyone else.

The circumstances of this case stand in stark contrast to the facts that supported the officer's reasonable belief in *Ryburn* that danger could be imminent. In *Ryburn,* four officers went to high school

---

[7] When Patrick was eventually stopped, he had no weapon on his person.

student Vincent Huff's home to investigate threats that he was going to "shoot up" the school. 132 S. Ct. at 988. The officers testified to facts that were specific to Mrs. Huff and her son that "led them to be concerned for their own safety and for the safety of other persons in the residence." *Id.* at 990. In addition to the reported threat of a school shooting, these facts included:

> the unusual behavior of the parents in not answering the door or the telephone; the fact that Mrs. Huff did not inquire about the reason for their visit or express concern that they were investigating her son; the fact that she hung up the telephone on the officer; the fact that she refused to tell them whether there were guns in the house; and finally, the fact that she ran back into the house while being questioned.

Id. Based on the suspected presence of weapons in the home of a teenager who had threatened to commit a violent felony by the use of deadly weapons, those officers had an "objectively reasonable basis" to fear that "family members or the officers themselves were in danger." *Id.* at 990. Here, Stanton attempts to justify his fear that Patrick threatened his safety, by pointing to the report of an incident involving a bat and his belief that Sims's neighborhood was a high-crime area. However, none of the factors: Stanton's belief that Patrick committed a misdemeanor by failing to heed his order, the original call to the police regarding the disturbance, the presence of gangs and the crime rate in the neighborhood, nor a combination

of all three is sufficient to constitute an "emergency" that justified breaking down a closed gate and entering without a warrant.

Stanton described Sims's neighborhood as "an area known for violence associated with the area gangs," and stated that he "was also aware of gang members being armed with weapons such as guns and knives." Based on the facts which he knew about the neighborhood and the report of a disturbance in the street, Stanton speculates that Patrick may have been carrying a concealed weapon, that he may have gone into Sims's home in order to arm himself and then return to the street, or that someone armed inside Sims's home might have attempted to interfere with Patrick's arrest. Without some particularized facts relating to Patrick, Stanton's inferences are too generalized and speculative to provide an "objectively reasonable basis" for fearing that violence might be imminent, *see Ryburn,* 132 S. Ct. at 992, and nothing in the record reveals an emergency that justifies the warrantless entry of a home's curtilage in pursuit of a misdemeanant.

A contrary conclusion would undermine Fourth Amendment protections for individuals residing, often not by choice, in poor neighborhoods where crime is more prevalent than in wealthy communities. As we have said in the context of drawing inferences from neighborhood characteristics to support reasonable suspicion of criminal activity, "[w]e must be particularly careful to ensure that a 'high crime' area

factor is not used with respect to entire neighborhoods or communities in which members of minority groups regularly go about their daily business." *United States v. Montero-Camargo,* 208 F.3d 1122, 1138 (9th Cir. 2000). We do not imply that general factors, such as the time of day, the nature of the call, or the officers' prior experience with gangs and violence in the neighborhood, are of no relevance to an officer's fear that violence may occur. To justify an emergency exception to the warrant requirement, however, these factors must be combined with particularized evidence that the person being pursued or the home being investigated poses a threat to the officer's or the public's safety. This was not the case here: Patrick entered Sims's home, where he was apparently welcome, and gave Stanton no reason to believe that his or anyone else's safety would be in danger.

In sum, Stanton's "assertion of a potential threat to [his] safety," based on generalized assumptions concerning the neighborhood or its residents, rather than specific facts relating to the individuals involved, did not justify an exception to the warrant requirement when viewed "in the context of the underlying offense," at most a misdemeanor. *LaLonde,* 204 F.3d at 958 n.16.

Qualified Immunity

In a claim for civil damages under § 1983, to avoid the bar of qualified immunity, the plaintiff must

show that the officer violated a constitutional right and that the right was "clearly established" at the time of the occurrence. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). The determination whether a right was clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz,* 533 U.S. 194, 201 (2001). The individual circumstances of the case do not, however, provide a basis for qualified immunity if "the unlawfulness was apparent in light of preexisting law." *Jensen v. City of Oxnard,* 145 F.3d 1078, 1085 (9th Cir. 1998) (internal citation omitted). "Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding." *Hope v. Pelzer,* 536 U.S. 730, 741 (2002). The Supreme Court has made clear that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* Therefore, the "salient question" is "whether the state of the law" in 2008 gave Stanton "fair warning" that his warrantless entry was unconstitutional. *Id.*

Contrary to the district court's findings, a reasonable officer should have known that the warrantless entry into Sims's front yard violated the Fourth Amendment because clearly established law afforded notice that Sims's front yard was curtilage and, was therefore, protected to the same extent as her home. Established law also afforded notice that a warrantless entry into a home cannot be justified by pursuit

of a suspected misdemeanant except in the rarest of circumstances. Since well before the incident occurred in 2008, Supreme Court law and the precedent of this court had established that, on the basis of the record before us, Stanton's conduct was clearly unconstitutional.

A front yard has been considered curtilage since 1984 when the Supreme Court decided *Oliver v. United States.* 466 U.S. at 170. A front yard enclosed by a six-foot-tall, wooden fence, in which private items are stored and social interactions take place is the paradigmatic example of curtilage and is both "clearly marked" and "easily understood." *Id.* at 182 n.12. Thus, Stanton should have known that his warrantless entry was presumptively unconstitutional.

This presumption may be overcome only by circumstances justifying either an exigency or emergency exception. Stanton attempts to show exigent circumstances by pointing to the risk that Patrick might escape. It should have been clear to Stanton, however, from Supreme Court and Ninth Circuit decisions that law enforcement actions involving a misdemeanor offense will rarely, if ever, justify a warrantless entry. *Welsh,* 466 U.S. at 750 (clearly established since 1984); *Johnson,* 256 F.3d at 908 (clearly established since 2001). That *Welsh* leaves open the possibility for a "rare" exception to this rule does not mean that the rule was not clearly established at the time and does not change our qualified immunity analysis. Here, nothing in the record suggests that this case was "rare" in any respect.

Stanton also contends that the emergency exception justified his warrantless entry by asserting that he feared for his safety. The circumstances of this case belie the reasonableness of that fear. The non-serious nature of the underlying offense, failure to heed an officer's command, precludes us from finding, on the record before us, that an emergency exception was applicable. *LaLonde,* 204 F.3d at 958 (clearly established since 2000). So, too, does the lack of any reasonable basis for any specific concern that the individuals involved were likely to engage in any act of violence. Accordingly, Stanton is not entitled to qualified immunity.

For the reasons stated above, the district court's order granting summary judgment in favor of the defendant is **REVERSED** and **REMANDED**.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DRENDOLYN SIMS, Plaintiff, vs. CITY OF LA MESA, Defendant.	CASE NO. 09cv1356 JM(WMc) ORDER GRANTING MOTION FOR SUMMARY JUDGMENT; DISMISSING STATE CLAIMS WITHOUT PREJUDICE (Filed Feb. 8, 2011)

The only remaining Defendant, Mike Stanton, moves for summary judgment on all claims asserted against him in Plaintiff Drendolyn Sims' First Amended Civil Rights Complaint ("FAC"). Plaintiff Drendolyn Sims opposes the motion. For the reasons set forth below, the court grants the motion for summary judgment in favor of Defendant and against Plaintiff on all claims and dismisses the state law claims without prejudice for lack of supplemental jurisdiction. The Clerk of Court is instructed to close the file.

BACKGROUND

On June 24, 2009, Plaintiff commenced this federal question action alleging that Defendant Officer John Doe and the City of La Mesa violated her federal civil rights when Officer Doe effectuated an unconstitutional arrest, an unconstitutional search, and used excessive force. Plaintiff also alleges state law

claims for negligence, negligent infliction of emotional distress, and battery.

On August 28, 2009 the court granted Defendant City of La Mesa's motion to dismiss with leave to amend, finding that Plaintiff failed to state a *Monell* claim. (Ct. Dkt. No. 8). On September 17, 2009 Plaintiff filed the FAC, naming Defendant Officer Mike Stanton as the only defendant.

The FAC

In broad brush, the FAC alleges that on the evening of May 26, 2008, Plaintiff was at her home when she heard commotion coming from the unit next door and she went outside to ask the individuals to quiet down. (FAC ¶¶5, 6). She then returned to the gateway area at the front of her apartment. The front yard has a six foot tall wooden yard gate. She was speaking with her guest, Nicholas Patrick, outside the front gate when a City of La Mesa patrol vehicle drove into the area. Officer Massey drove the vehicle and Defendant Officer Stanton was a passenger in the vehicle. (*Id.* ¶10). Plaintiff and Mr. Patrick then entered the yard through the gate and closed it. Plaintiff was standing directly behind the gate. She alleges that "Defendant observed the Plaintiff walk through the front-yard gate onto the premises of Unit #A-4." (*Id.* ¶15). Within "moments" of entering through the front gate, and without any warning, Defendant Stanton allegedly kicked open the gate, seriously injuring Plaintiff. (*Id* ¶¶17, 22).

Based upon the above generally described conduct, Plaintiff alleges violations of 42 U.S.C. §1983 for unconstitutional search and excessive force. Notably, Plaintiff requests dismissal of the unconstitutional seizure claim for lack of evidence. (Oppo. at p.1 n.1). Defendant moves for summary judgment on all remaining claims.

DISCUSSION

Legal Standards

A motion for summary judgment shall be granted where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *Prison Legal News v. Lehman,* 397 F.3d 692, 698 (9th Cir. 2005). The moving party bears the initial burden of informing the court of the basis for its motion and identifying those portions of the file which it believes demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). There is "no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." *Id.* (emphasis in original). The opposing party cannot rest on the mere allegations or denials of a pleading, but must "go beyond the pleadings and by [the party's] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (citation

omitted). The opposing party also may not rely solely on conclusory allegations unsupported by factual data. *Taylor v. List,* 880 F.2d 1040, 1045 (9th Cir. 1989).

The court must examine the evidence in the light most favorable to the non-moving party. *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962). Any doubt as to the existence of any issue of material fact requires denial of the motion. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986). On a motion for summary judgment, when "'the *moving party* bears the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence were uncontroverted at trial.'" *Houghton v. South,* 965 F.2d 1532, 1536 (9th Cir. 1992) (emphasis in original) (quoting *International Shortstop, Inc. v. Rally's, Inc.,* 939 F.2d 1257, 1264-65 (5th Cir. 1991), *cert. denied,* 502 U.S. 1059 (1992)).

Qualified Immunity

The defense of qualified immunity protects "government officials . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). The rule of qualified immunity protects "'all but the plainly incompetent or those who knowingly violate the law.'" *Saucier v. Katz,* 533 U.S. 194, 202,(2001) (quoting *Malley v. Briggs,* 475 U.S. 335, 341 (1986)). A defendant may

have a reasonable, but mistaken, belief about the facts or about what the law requires in any given situation. *Id.* "Therefore, regardless of whether the constitutional violation occurred, the [official] should prevail if the right asserted by the plaintiff was not 'clearly established' or the [official] could have reasonably believed that his particular conduct was lawful." *Romero v. Kitsap County,* 931 F.2d 624, 627 (9th Cir.1991).

The defense of qualified immunity balances "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan,* 555 U.S. 223, 129 S.Ct. 808, 815, 172 L.Ed.2d 565 (2009). Determining whether an official is entitled to qualified immunity requires a two-part analysis. *Saucier,* 533 U.S. at 201; *Ramirez v. City of Buena Park,* 560 F.3d 1012, 1020 (9th Cir.2009). First, a court must decide whether the factual record, viewing the record in the light most favorable to Plaintiff, establishes that Defendant Stanton violated a constitutional right. *Id.* Second, the court must decide whether the statutory or constitutional right at issue was "clearly established." *Id.* A right is "clearly established" for the purpose of qualified immunity if "'it would be clear to a reasonable [official] that his conduct was unlawful in the situation he confronted' . . . or whether the state of the law [at the time of the alleged violation] gave 'fair warning' to [him] that [his] conduct was unconstitutional." *Clement v.*

Gomez, 298 F.3d 898, 906 (9th Cir.2002) (quoting *Saucier,* 533 U.S. at 202). Because qualified immunity is an affirmative defense, the initial burden of proof lies with the official asserting the defense. *Harlow,* 457 U.S. at 812; *Houghton v. South,* 965 F.2d 1532, 1536 (9th Cir.1992). Finally, while often beneficial to approach the two-part inquiry in the sequence prescribed above, it is not mandatory. *Pearson,* 129 S.Ct. at 818. A court has "discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first." *Id.*; *Ramirez,* 560 F.3d at 1020. A court may grant defendants qualified immunity and dismiss plaintiff's claim if at any point the court answers either prong in the negative. *See e.g., Tibbetts,* 567 F.3d at 536-39 (bypassing the first prong and granting the defendants qualified immunity because the plaintiff's due process claim was not a "clearly established right" at the time of the alleged violation).

The Constitutional Violations

Plaintiff alleges that Defendant Stanton (1) applied excessive force in violation of the Fourth Amendment and (2) violated the Fourth Amendment when he opened the gate to the yard in front of Unit A4. Each is discussed in turn, followed by a discussion of Ms. Sims' evidentiary submissions.

The Excessive Force Claim

The parties agree that the Fourth Amendment standards apply to Plaintiff's claims of excessive force. (Oppo. at p.1 n.1; Reply at p.1). The Fourth Amendment requires peace officers to use only an amount of force that is objectively reasonable in light of all the surrounding circumstances. *Graham v. Connor,* 490 U.S. 386, 397 (1989); *Headwaters Forest Defense v. County of Humboldt,* 240 F.3d 1185, 1198 (9th Cir. 2001). "[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham,* 490 U.S. at 397. Assessing the level of permissible force "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests and the countervailing governmental interests at stake." *Id.* (internal quotation marks and citations omitted); *see also Mendoza v. Block,* 27 F.3d 1357, 1362 (9th Cir.1994). Courts must give due regard to the fact that officers frequently make split-second judgments about the amount of force to use without the benefit of hindsight. *Graham,* 490 U.S. at 396-97. Further, the officer's right to make an arrest necessarily includes the right to use some degree of force. *Graham,* 490 U.S. at 396; *Cunningham v. Gates,* 229 F.3d 1271, 1290 (9th Cir. 2000); *see also* Cal. Penal Code §835a ("A peace officer who attempts to make an arrest need not retreat or desist from his efforts by

reason of the resistance or threatened resistance of the person being arrested."). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham,* 490 U.S. at 396.

The court concludes that Defendant Stanton satisfies his summary judgment burden by coming forward with the following evidence. Over the Memorial Day weekend on May 27, 2008 at 1:05 a.m., Officers Stanton and Massey responded to a call of individuals involved in an unknown disturbance (fight) in progress involving individuals with a baseball bat. (Stanton Decl. ¶2; Massey Decl. ¶2). The officers were aware, based upon prior contact, that the area was an area known for violence associated with gangs, including the use of knives and firearms. (Stanton Decl. ¶5). The Officers drove a marked police cruiser north on Thorne Drive, the street where the reported disturbance was located. As the Officers approached the scene of the reported disturbance, the Officers observed three individuals standing on the west side of the street, and to their north, the approximate location of the reported disturbance. The Officers could not determine whether any of the three individuals were armed with a weapon. Upon seeing the marked policed [sic] vehicle, two of the individuals separated from the third and walked northbound/westward into a nearby apartment complex. (Stanton Decl. ¶2; Massey Decl. ¶1).

The third individual, later identified as Nicholas Patrick, or "Bibs," crossed the street in front of the patrol car. At that point, Patrick was about 25 yards ahead of the patrol vehicle. (Massey Decl. ¶3). Officer Massey, the driver of the patrol vehicle, also observed an unknown black female standing next to a gate that Patrick was approaching. *Id.* Patrick walked quickly as he approached the six foot high wooden fence and gate. Officer Stanton, wearing a full police uniform, exited the vehicle and shouted at Patrick to stop. Patrick ignored the command and continued walking towards the gate. Officer Stanton loudly announced "police" again and ordered Patrick to stop on several occasions. At a distance of about 25 feet, Patrick looked directly at Officer Stanton, ignored his repeated order to stop and quickly entered the front gate of Unit A4. As soon as Patrick entered the gate, it quickly closed. (Stanton Decl. 3). At this point, Officer Stanton was only a few seconds behind Patrick. Officer Stanton also believed that Patrick's action of ignoring the officer's command violated California Penal Code §148 (a misdemeanor crime for willfully, resisting, delaying or obstructing a police officer), a crime committed in public and in the officer's presence. (Stanton Decl. ¶3). Officer Stanton, fearing for his safety and based upon the totality of circumstances and in the immediate pursuit of a possibly armed criminal suspect, made a split-second decision to kick open the gate. Officer Stanton did not believe that anyone was standing behind the gate. When he kicked open the gate, he struck Ms. Sims, causing her serious injury.

On the evidentiary record submitted by the parties, the court concludes that no constitutional violation occurred for two reasons. First, there is no evidence to show that Defendant Stanton possessed the requisite mental state for a Fourth Amendment violation.

> [A] violation of the Fourth amendment requires an intentional acquisition of physical control. A seizure occurs even when an unintended person or thing is the object of the detention or taking, but the detention or taking itself must be willful. This is implicit in the word 'seizure,' which can hardly be applied to an unknowing act.

Bower v. County of Inyo, 489 U.S. 593, 596 (1989). While a government actor caused Ms. Sims' injuries, the object of Defendant Stanton's intentions was a closed wooden gate, and not the seizure of either Ms. Sims or Mr. Patrick. There is no evidence submitted by any party to show that Defendant Stanton intended to harm any person when he kicked open the gate.[1] Rather, Defendant Stanton, out of concern for personal safety and in pursuit of a fleeing potentially armed suspect and lawbreaker (the §148 violation), made a split-second decision to kick open the gate.

---

[1] Ms. Sims testified that she was unaware of the presence of any police officers near her apartment at the time of her injuries, (Sims Depo. p.123:10-16), and Defendant Stanton testified that he did not see nor believe anyone was behind the gate. (Stanton Decl. ¶4). There is simply no evidence that Defendant Stanton intentionally applied force to any individual.

The court concludes that Plaintiff was not seized within the meaning of the Fourth Amendment. As noted in *Bower,* "the Fourth Amendment addresses 'misuse of power,' not the accidental effects of otherwise lawful government conduct." *Id*; *Madeiros v. O'Connell,* 150 F.3d 164, 169 (2nd Cir. 1998) (no Fourth Amendment violation occurred because the hostage was injured by a bullet intended for the hostage-taker). As the injuries to Ms. Sims were unintentional for purposes of the Fourth Amendment, Defendant Stanton is entitled to summary judgment on the excessive force claim.

Second, as more fully discussed below, the evidentiary record establishes that the force applied by Defendant Stanton to the gate was not excessive, unreasonable, nor unnecessary and therefore no Fourth Amendment violation occurred.

In sum, the court grants summary judgment on the excessive force claim in favor of Defendant Stanton and against Ms. Sims.

The Unconstitutional Search Claim

Plaintiff argues that Defendant Stanton violated the Fourth Amendment when he proceeded to open the gate to Unit A4 without a warrant. It is axiomatic that the "'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" *Welsh v. Wisconsin,* 466 U.S. 740, 748 (1984) (quoting *United States v. United States District Court,* 407 U.S. 297, 313 (1972)). "In terms that apply

equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton v. New York*, 445 U.S. 573, 589-590 (1980). Plaintiff argues that Defendant Stanton lacked reasonable suspicion or probable cause to open the gate to Unit A4.

Considering the exigencies at the time of the entry into the property, the court concludes that Defendant Stanton was lawfully permitted to pursue Mr. Patrick into the curtilage area of Unit A4 and to apply a reasonable amount of force to the gate in conducting the pursuit. Justification for a detention existed when Defendant Stanton – knowing the history of the area, the nature of the call, the potential for a violent disturbance – approached the area and observed the three men at the location of the reported disturbance quickly disperse upon observing the Officers arrive. Such conduct gave rise to an articulable suspicion to conduct an investigatory stop in a public place under *Terry v. Ohio*, 392 U.S. 1 (1968). After Mr. Patrick crossed the street in front of the Officers, Defendant Stanton exited the patrol unit, identified himself as a police officer, approached Mr. Patrick, and ordered him to stop. Mr. Patrick looked directly at Defendant Stanton, continued to walk quickly away from him, and ignored the Officer's command to stop. At this point, Defendant Stanton had, at the very least, grounds to detain Mr. Patrick for violation of Penal Code §148. Indeed, Mr. Patrick's

disobedience of a lawful order to stop constituted a basis for arrest for violation of Penal Code §148, a misdemeanor. Mr. Patrick continued walking and entered and closed the gate to Unit A4. Defendant Stanton reached the gate a few seconds after Mr. Patrick. Defendant Stanton did not see anyone behind the gate nor believe anyone was behind the gate. (Stanton Decl. ¶4). Based upon these identified circumstances, and fearing for his and the public's safety and in the immediate pursuit of a possibly armed criminal suspect, Defendant Stanton made the split-second decision to kick open the gate to obtain a view on the other side of the fence and to detain Mr. Patrick. As a matter of law, the totality and exigency of the circumstances establish that opening the gate into the curtilage area of Unit A4 did not result in an unconstitutional search.

Furthermore, an individual may not "thwart an otherwise proper arrest" that was set in motion in a public place by entering a gate to the yard area of Unit A4. *United States v. Santana*, 427 U.S. 38 (1976). The warrantless intrusion into the curtilage area of Unit A4, as opposed to the home itself, is justified by (1) the lesser expectation of privacy in having the public enter the gate to approach the home (as opposed to the home itself)[2] and (2) objective

---

[2] The court notes that the expectations of privacy for entry onto one's property by means of a gate are markedly different from entry of the home by means of the dwelling's front door. In most instances, one reasonably anticipates that the public may

(Continued on following page)

facts and circumstances: knowledge of the area, the time of day, nature of the call, the reported existence of weapons (baseball bat), the conduct of Mr. Patrick in failure to comply with Defendant Stanton's lawful order to stop, and officer and public safety concerns. It is well-established by the Supreme Court that the "Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." *Warden, Md. Penitentiary v. Hayden,* 387 U.S. 294, 298-99 (1967). The totality of the circumstances identified above justify Defendant Stanton's limited pursuit of Mr. Patrick by opening the gate to the yard of Unit A4.

Defendant Stanton also persuasively argues that his conduct did not violate any clearly established statutory or constitutional right. As set forth above, a right is "clearly established" for the purpose of qualified immunity if "'it would be clear to a reasonable [official] that his conduct was unlawful in the situation he confronted' . . . or whether the state of the law [at the time of the alleged violation] gave 'fair warning' to [him] that [his] conduct was unconstitutional." *Clement,* 298 F.3d at 906 (quoting *Saucier,* 533 U.S. at 202). Here, even in the event a constitutional violation occurred, Defendant Stanton comes forward with

---

enter a gate to one's home without first obtaining permission in order to approach the home itself. However, under no circumstance does one reasonably anticipate that the public may enter one's home without permission.

evidence to show that it is not clearly established that his conduct would have violated the Fourth Amendment.

The court concludes that no reasonable officer could conclude that opening the gate to the yard in front of Unit A4 violated the Fourth Amendment knowing: the nature of the area, the time of day, the report of potential violence at the scene, the reported existence of weapons (baseball bat), the conduct of Mr. Patrick in failure to comply with Defendant Stanton's lawful order to stop, and officer and public safety concerns.

In *Santana,* the police officers had probable cause to believe that defendant Santana had just sold a small quantity of heroin and possessed marked money used to purchase the heroin. As the agents approached Santana's home, they saw her standing in the doorway of the home with a brown paper bag in her hand. 427 U.S. at 40. The vehicle stopped about 15 feet in front of Santana and the officers shouted "Police." Santana then retreated into the home, leaving the door open. The police, without a search or arrest warrant, followed her into the home and arrested her. The district court granted the motion to suppress on the ground that, although probable caused [sic] existed to arrest Santana, the warrantless entry into the home did not justify a "hot pursuit." The Supreme Court reversed, holding that once police officers have probable cause to arrest a suspect, the "suspect may not defeat an arrest which has been set in motion in a public place . . . by escaping into a

private place." *Id.* at 43. Here, as in *Santana,* Mr. Patrick committed a crime in a public place, the Penal Code §148 violation. Under *Santana,* Mr. Patrick could not avoid detention by entering the gate to Unit A4.

Plaintiff argues that *United States v. Dunn,* 480 U.S. 294 (1987) and *Deorle v. Rutherford,* 272 F.3d 1272 (9th Cir. 2001) clearly establish that Defendant Stanton's conduct violated the Fourth Amendment. (RT at p.15:8-20; RT at p.28:22-25). In *Dunn,* the Supreme Court held that the barn on a 198-acre property was not within the curtilage of the home and therefore officers did not require a search warrant to look inside the barn. The officers scaled a perimeter fence and at least one barb wire fence when they smelled chemicals coming from a barn on a ranch located 50 yards from the fence surrounding the house. The officers then went to the barn and, with the assistance of a flashlight, looked inside and observed what they believed to be an illegal drug lab. Possessing knowledge that the barn contained a drug lab, the officers obtained a search warrant and subsequently discovered the drug lab and arrested the defendant. The district court denied defendant's motion to suppress and the Fifth Circuit reversed. The Supreme Court reversed the Fifth Circuit, noting that the barn lay outside the curtilage of the ranch house. 480 U.S. at 301. The Supreme Court held that the officers could enter the property, scale two fences, and look inside the barn without violating the Fourth Amendment. The Supreme Court highlighted that the

central component to the Fourth Amendment's expectation of privacy inquiry is "whether the area harbors the 'intimate activity associated with the 'sanctity of one's home and the privacies of life.'" *id.* at 300. The court concludes here that the area behind the gate, unlike a door to a home, is not closely associated with the "sanctity of one's home and the privacies of life." *Id.* Accordingly, *Dunn* does not support Plaintiff's argument that Officer Stanton could not open the gate to Unit A4.

The court concludes that *Deorle* is also not helpful to Plaintiff. *Deorle* is an excessive force case, not an illegal search case. The officer in *Deorle* intentionally shot the plaintiff with a lead-filled beanbag round, seriously injuring the plaintiff. In reversing the district court's ruling on qualified immunity, the Ninth Circuit held, over dissent,

> Every police officer should know that it is objectively unreasonable to shoot – even with lead shot wrapped in a cloth case – an unarmed man who: has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals. Here, all those factors were present. Deorle had complied with the police officers' instructions, had discarded his potential weapons whenever asked to do so, and had not assaulted anyone; in addition, a

> team of negotiators essential to resolving such situations was en route.

272 F.3d at 1285. The present case does not involve the intentional infliction of force on any person.

In sum, Defendant Stanton is entitled to summary judgment on his claim of qualified immunity because it is not clearly established that Defendant Stanton's conduct violated the Fourth Amendment.

Plaintiff's Evidentiary Submissions

The court also concludes that Plaintiff's confusing evidentiary submissions fail to create genuine issues of material fact because they provide insufficient evidentiary support on whether (1) Defendant Stanton intentionally violated the Fourth Amendment; (2) the force applied to the gate was reasonable; or (3) the opening of the gate to the yard of Unit A4 constituted an unconstitutional search. As such, Plaintiff has fallen short of bringing forth evidence sufficient to create a genuine issue of material fact. *See* Fed.R.Civ.P. 56. Specifically, Plaintiff Sims testified that she was unaware of the presence of any police officers. (Sims Depo. at p. 123:6-10). Ms. Sims did not hear Defendant Stanton's commands nor see police officers in the area. The thrust of Ms. Sims' testimony is that she was aware that there was a disturbance in front of the apartment complex with a dangerous weapon (a baseball bat) and that the individual who called emergency services to report the disturbance was justified in doing so. (Sims Depo. at

pp. 99-125). According to Ms. Sims, she was standing in the street talking with Mr. Patrick for about five seconds when they walked towards the gate to Unit A4, opened it, entered the front yard, and closed the gate. (Sims Depo. at p. 122:14-123:2). Then, Ms. Sims remained standing behind the gate for approximately two to three minutes with Mr. Patrick when, all of a sudden, the gate opened and struck her. (Sims Depo. at p. 123:15-124:13). At no time prior to being struck was Ms. Sims aware of any police presence. Under this version of Plaintiff's factual submission, accepted as true, she fails to raise a genuine issue of material fact with respect to the intent required to state a Fourth Amendment claim, that the force applied was excessive, or that Defendant Stanton's opening of the gate violated the Fourth Amendment.

However, the most troubling aspect of the evidentiary record is Plaintiff's contradictory testimony. Plaintiff testified that she was conversing with Mr. Patrick in the street for about five seconds, no other individuals were present on the street at that time, she and Mr. Patrick together went to the gate to Unit A4, they entered the property and closed the gate. At her deposition, Ms. Sims testified that the time between entering the gate and the time she was struck was about two to three minutes. (Sims Depo. 124:15-125:13). According to the statements of Ms. Sims made on the date of the incident, however, she was struck by the gate "immediately after shutting the

gate." (Plaintiff's Exh. 1, p.6).[3] Plaintiff's statements on timing cannot be reconciled. If Plaintiff had indeed been inside the gate with Mr. Patrick for two to three minutes before being struck, then Officer Massey and Defendant Stanton could not have seen the group of three men standing at the location of the reported disturbance, the Officers could not have seen Mr. Patrick cross the street or enter the gate, Defendant Stanton could not have ordered Mr. Patrick to stop, Officer Massey could not have observed a woman standing by the gate to Unit A4, and the Officers could not have seen Mr. Patrick enter the gate because only several seconds had elapsed from the time Defendant Stanton exited the patrol car and closely followed Mr. Patrick in hot pursuit as he entered the gate.

Although not indispensable to the court's conclusions, the court finds Plaintiff's testimony that she stood behind the gate for two to three minutes to be of

---

[3] The court notes that the FAC's allegations are generally consistent with the Officers' testimony: There was a commotion outside Ms. Sims' apartment, she stood outside the gate, a La Mesa police vehicle drove onto the scene, Defendant Stanton observed her standing outside the gate to Unit A4, she and Mr. Patrick entered and closed the gate, and "[w]ithin moments of the Plaintiff entering the front-yard gate," the gate was kicked open. (FAC ¶¶6-17). Notably, the FAC alleges that Defendant Stanton "was unable to see whether any one of the individuals who he observed walking through the gate remained behind the gate and would be struck." (FAC ¶18). In other words, Plaintiff alleges that Defendant could not see whether anyone stood behind the gate when it was kicked open.

insufficient value to create a genuine issue of material fact. In the Ninth Circuit, this court cannot disregard a party's evidence unless (1) the court finds the evidence is a sham and (2) the contradiction is clear and unambiguous. *Van Asdale v. International Game Technology,* 577 F.3d 989, 998 (9th Cir.2009). While credibility determinations are generally inappropriately resolved on a motion for summary judgment, the court notes that this case is an exception to the general rule because Plaintiff herself is the source of the confusion. *See Kennedy v. Allied Mut. Ins. Co.,* 952 F.2d 262, 266 (9th Cir. 1991) (a party cannot create an issue of fact by submitting contradictory evidence on both sides of the issue). Plaintiff has testified that she stood behind the gate for "two to three minutes," (Sims Depo. at p.19) and alternatively, that she was struck immediately after closing the gate. (Plaintiff's Exh.1, p.6). Both of Plaintiff's statements cannot be true. The court further notes that Plaintiff's declaration, executed after Defendant filed the motion for summary judgment, does not clarify her time discrepancy. Plaintiff not only failed to utilize the opportunity to clarify her contradictions in an evidentiary submission, but she failed to submit any evidence from a percipient witness, such as Mr. Patrick, that might have shed some light on her confusing and contradictory position. While Plaintiff's contradictory evidence may well be the result of an honest discrepancy or mistake, the court notes that she was not precluded from elaborating or clarifying the inconsistent testimony. As noted by the Supreme Court, the "[s]ummary judgment procedure is properly regarded

not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex*, 477 U.S. at 327. To permit a party to submit contradictory evidence on both sides of an issue in order to create a genuine issue of fact, without explanation, significantly undermines the value of the summary judgment procedure.[4]

---

[4] The court also rejects Plaintiff's assertions of six material disputed facts. (Oppo. at pp.3:24-5:6). First, Plaintiff argues that there is a factual dispute because Defendant testified that the three men were on the west side of Thorne and Officer Massey testified that the three men were to the north of them. (Oppo at p.3:24-4:2). The undisputed record establishes that the group was both to the north and west of the patrol car as it proceeded on Thorne Drive. This is not a material factual dispute. Second, Plaintiff argues that the Defendant Stanton stated that the patrol car *stopped* about 7-8 yards from Mr. Patrick whereas Officer Massey states in the Contact Report that Mr. Patrick crossed about 25 yards in front of the patrol car. The 25 yard estimate is not the *stopped* distance, but the distance when the "patrol unit came into full view where it could be identified." (Plaintiff's Exh. 1 at pp.4, 8). This is not a material factual dispute. Third, Plaintiff argues that Defendant stated in the Contact Report that Mr. Patrick walked at a "quick pace" but in his affidavit he states that Mr. Patrick quickly "walked/run." (Oppo at p.3:8-11). This is not a material factual dispute. Fourth, Plaintiff argues that there is a factual dispute whether Defendant Stanton shouted for Mr. Patrick to stop because Plaintiff testifies that she did not see or hear any police officers. On the present record, this is not a material factual dispute because the fact that Ms. Sims did not hear or see the Officers does not mean the officers were not present (she did not see them) or shouted warnings to Mr. Patrick (she did not hear them). Even

(Continued on following page)

Finally, the court addresses Plaintiff's expert witness.[5] The court rejects Dr. Steed's opinions that the Officers lacked reasonable suspicion to briefly detain Mr. Patrick or probable cause to pursue him into the front yard of Unit A4. (Steed Decl. ¶¶ 15, 17-23). Dr. Steed possesses both a Master's degree and Ph.D. in the field of Human Behavior. Dr. Steed also appears qualified to provide certain testimony concerning law enforcement procedures. However, for the reasons set

---

if relevant to the Fourth Amendment analysis, this does not give rise to a material question of fact. Fifth, Plaintiff argues that there is a factual dispute as to whether Mr. Patrick heard the alleged commands to stop. There is no declaration or deposition testimony to show what Mr. Patrick heard or did not hear. While there is an inadmissible hearsay statement in the Contact Report that Mr. Patrick told Defendant Stanton that he "did not tell him to stop," (Plaitnif's [sic] Exh. 1 at p.4), such a hearsay statement is insufficient to create a material factual dispute. Sixth, Plaintiff aruges [sic] that there is a factual dispute whether Defendant Stanton knew that Plaintiff was standing behind the gate. While Defendant Stanton testifies that he did not see or believe that anyone was behind the gate, Officer Massey testified that he observed a black woman standing next to the gate as Mr. Patrick approached the gate. There is no evidence showing that Defendant Stanton saw the woman standing by the gate. Notably, Ms. Sims testified that she did not see any police officers and the FAC alleges that Defendant Stanton did not see anyone behind the gate. (FAC ¶18). This is not a material factual dispute.

[5] The court also rejects Dr. Steed's opinions regarding the six factual disputes identified in Plaintiff's brief for the reasons set forth in the previous footnote. As set forth above, despite Mr. Steed's opinions, the court concludes that the Officers had articulable suspicion to briefly detain Mr. Patrick for questioning and possessed probable cause to believe that Mr. Patrick violated Penal Code §148.

forth herein, the court rejects Dr. Steed's opinions that the officers lacked articulable reasonable suspicion to briefly detain Mr. Patrick and probable cause to believe a crime was committed when Mr. Patrick failed to comply with Defendant Stanton's lawful order to stop. Whether Defendant engaged in a lawful *Terry* stop or whether the Defendant possessed probable cause to arrest Mr. Patrick is, under the circumstances, a legal conclusion for the court.

In sum, the court concludes that Defendant Stanton is entitled to summary judgment on all federal claims because no Fourth Amendment violation occurred.

Supplemental Jurisdiction

Pursuant to 28 U.S.C. §1367(a), in any civil action in which the district court has original jurisdiction, the district court "shall have supplemental jurisdiction over all other claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III," except as provided in subsections (b) and (c). "[O]nce judicial power exists under §1367(a), retention of supplemental jurisdiction over state law claims under 1367(c) is discretionary." *Acri v. Varian Assoc., Inc.*, 114 F.3d 999, 1000 (9th Cir. 1997). "The district court may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. §1367(c)(3). The Supreme Court has cautioned that "if the federal claims are

dismissed before trial, . . . the state claims should be dismissed as well." *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 726 (1966).

Because the court has dismissed all of plaintiff's federal claims, the court declines to exercise supplemental jurisdiction under 28 U.S.C. §1367(c) as to the state law claims. "In the usual case in which federal law claims are eliminated before trial, the balance of factors . . . will point toward declining to *exercise jurisdiction over the remaining state law claims.*" *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 350 n.7 (1988); *Schneider v. TRW, Inc.,* 938 F.2d 986, 993 (9th Cir. 1991). Here, there does not appear to be any extraordinary or unusual circumstances which would warrant retention of the state law claims. Accordingly, the court dismisses the state law claims without prejudice.

In sum, the court grants summary judgment in favor of Defendant Stanton and against Plaintiff Sims on all federal claims. The court also dismisses the state law claims for lack of supplemental jurisdiction. The Clerk of Court is instructed to close the file.

IT IS SO ORDERED.

DATED: February 8, 2011

/s/ Jeffrey T. Miller
Hon. Jeffrey T. Miller
United States District Judge

cc: All parties

EXHIBIT
Deposition
Date

OPPOSITION BRIEF

No. 12-1217

IN THE SUPREME COURT OF THE UNITED STATES

MIKE STANTON,
Petitioner,
v.

DRENDOLYN SIMS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

L. MARCEL STEWART
LAW OFFICE OF L. MARCEL STEWART
2534 State Street, Suite 423
San Diego, CA 92101
(619) 702-4123

SCOTT MICHELMAN
Counsel of Record
ADINA H. ROSENBAUM
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
smichelman@citizen.org

Counsel for Respondent Drendolyn Sims

July 2013

QUESTION PRESENTED

Was it reasonable for a police officer to undertake a warrantless intrusion into the curtilage of a third-party's home, kicking open her gate and causing serious injury, in order to pursue an individual suspected only of failing to stop in response to the officer's order, where the officer lacked probable cause to believe that a crime had been committed at all?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 4

I. The Decision Below Does Not Implicate A Split Of Authority Regarding The Standard For Evaluating Exigent Circumstances. 4

II. This Court's Case Law Clearly Establishes That Sims's Private Fenced-In Front Yard Was Curtilage 13

III. The Answer To the Questions Presented Will Not Affect The Outcome Of This Case Because Petitioner Lacked Probable Cause. 15

CONCLUSION 18

TABLE OF AUTHORITIES

FEDERAL CASES

Aragon v. City of Albuquerque,
423 F. App'x 790 (10th Cir. 2011) 10

Brigham City v. Stuart,
547 U.S. 398 (2006) 4

Cupp v. Murphy,
412 U.S. 291 (1973) 5

Devenpeck v. Alford,
543 U.S. 146 (2004) 15

Go-Bart Importing Co. v. United States,
282 U.S. 344 (1931) 4

Hope v. Pelzer,
536 U.S. 730 (2002) 14

Illinois v. McArthur,
531 U.S. 326 (2001) 4, 5

Kirk v. Louisiana,
536 U.S. 635 (2002) 15

Mascorro v. Billings,
656 F.3d 1198 (10th Cir. 2011) 7, 10

Missouri v. McNeely,
133 S. Ct. 1552 (2013) 4, 11

Ohio v. Robinette,
519 U.S. 33 (1996) 4

Oliver v. United States,
466 U.S. 170 (1984) 13

Payton v. New York,
445 U.S. 573 (1980) 15

Richards v. Wisconsin,
520 U.S. 385 (1997) 11

Romero v. Story,
672 F.3d 880 (10th Cir. 2012) 17

Terry v. Ohio,
392 U.S. 1 (1968) 16

United States v. Dunn,
480 U.S. 294 (1987) 13

United States v. Jaramillo,
25 F.3d 1146 (2d Cir. 1994) 17

United States v. Johnson,
106 F. App'x 363 (6th Cir. 2004) 7

United States v. Johnson,
256 F.3d 895 (9th Cir. 2001) 5, 12

United States v. Roberts,
747 F.2d 537 (9th Cir. 1984) 14, 15

United States v. Santana,
427 U.S. 38 (1976) 5

Welsh v. Wisconsin,
466 U.S. 740 (1984) 5

Ybarra v. Illinois,
444 U.S. 85 (1979) 16

STATE CASES

Commonwealth v. Curry,
26 Va. Cir. 179 (Va. Cir. Ct. 1992) 8

Gasset v. State,
490 So. 2d 97 (Fla. Ct. App. 1986) 7

LaHaye v. State,
1 S.W.3d 149 (Tex. Ct. App. 1999) 6

In re Lavoyne M.,
270 Cal. Rptr. 394 (Cal. Ct. App. 1990) 9

Lepard v. State,
542 N.E.2d 1347 (Ind. Ct. App. 1989) 8

McDermott v. State,
877 N.E.2d 467 (Ind. Ct. App. 2007) 8, 9

People v. Allen,
167 Cal. Rptr. 502 (Cal. Ct. App. 1980) 16

People v. Lloyd,
265 Cal. Rptr. 422 (Cal. Ct. App. 1989) 9

People v. Ramirez,
44 Cal. Rptr. 3d 813 (Cal. Ct. App. 2006) 16

People v. Thompson,
135 P.3d 3 (Cal. 2006) 9

Robinson v. Commonwealth,
639 S.E.2d 217 (Va. 2007) 8

State v. Alvarez,
31 So. 3d 1022 (La. 2010) 6

State v. Bell,
28 So. 3d 502 (La. Ct. App. 2009) 6

State v. Bessette,
21 P.3d 318 (Wash. Ct. App. 2001) 7

State v. Bolte,
560 A.2d 644 (N.J. 1989) 7

State v. Ramirez,
814 P.2d 1131 (Utah Ct. App. 1991) 7

State v. Ricci,
739 A.2d 404 (N.H. 1999) 6

State v. Straub,
749 N.E.2d 593 (Ind. Ct. App. 2001) 9

In re Tony C.,
582 P.2d 957 (Cal. 1978), *corrected*, 697 P.2d 311 (Cal. 1985) 16, 17

STATUTES

California Penal Code § 148 15

INTRODUCTION

Petitioner asks this Court to review a fact-bound application of a well-established standard. It is black-letter law that the Fourth Amendment's warrant requirement yields upon a showing of probable cause together with exigent circumstances, and that the existence of an exigency, in turn, is evaluated based on the totality of the circumstances. This standard is consistently applied by the courts of appeals and state courts, and it is the standard the court of appeals applied here.

Examining the totality of the circumstances in this case, the court of appeals held that the exigency exception did not justify an officer's late-night warrantless intrusion into the curtilage of the home of a non-suspect, Respondent Drendolyn Sims, where the officer was chasing an individual suspected of nothing more than failure to respond to the officer's order to stop walking away, where the officer could have knocked at Sims's gate, and where there was no danger to the officer or anyone else.

Petitioner complains that the court of appeals did not apply a per se rule holding that an exigency necessarily exists whenever an officer is chasing someone, no matter what the chased individual is suspected of doing and regardless of whether a third-party's rights are impinged or any other circumstances. But this Court has consistently resisted creating per se rules to govern the fact-bound inquiry into exigent circumstances, and Petitioner provides no reason to depart from that approach now.

Inherent in the nature of legal standards such as "exigent circumstances" and "clearly established law" is that they produce different outcomes in different factual scenarios. Petitioner's long list of cases purportedly showing a conflict of authority on the question of exigent circumstances demonstrates no more than this legal truism. Policing individual applications of this Court's well-settled standards regarding exigent circumstances and qualified immunity would be an inefficient use of the Court's resources.

Additionally, this case presents a poor vehicle to reconsider this Court's standard for determining exigency. Regardless of whether exigency existed, kicking open Sims's gate without a warrant violated the Fourth Amendment because Petitioner lacked probable cause to believe the individual he was chasing had committed a crime.

The petition should be denied.

STATEMENT OF THE CASE

In the early morning hours of May 27, 2008, Petitioner Mike Stanton kicked open the gate of Respondent Drendolyn Sims's small front yard, slamming her against concrete stairs and causing a head laceration, a shoulder injury, and temporary loss of consciousness or incoherence, for which Sims was taken to the hospital. Pet. App. 6-7.

Stanton had come to Sims's neighborhood to investigate a report of an "unknown disturbance" involving a baseball bat. *Id.* at 6. When Stanton and his

partner arrived, they saw Nicholas Patrick and two other men, none of whom was carrying a baseball bat or any other type of weapon, walking in the street. *Id.* The officers had no information linking Patrick to the disturbance, nor did they observe him engage in any conduct that would suggest he had been involved in the disturbance. *Id.* at 6-7. Nevertheless, according to Stanton, he called out for Patrick to stop, *id.* at 7; Sims, who was standing in her yard nearby, did not hear any such order. 9th Cir. Excerpts of Record 11, 24-26 (Sims Dep. at 125; Sims Decl.).

Patrick walked through Sims's gate, and it shut behind him. Pet. App. 7. The gate is part of a solid wood fence more than six feet high that entirely encloses the front yard to Sims's home, *id.* at 7, and ensures "complete seclu[sion]." *Id.* at 8. Sims uses the yard for socializing and for storing her wheelchair. *Id.*

After Patrick entered, Stanton kicked open the gate, injuring Sims, who was standing behind it when it flew open. *Id.* at 7. The gate struck her and knocked her into her front stairs; she was temporarily unconscious, or at least became incoherent, from the blow. *Id.*

Sims sued Stanton for damages under 42 U.S.C. § 1983 and state tort law. After discovery, the district court granted Stanton summary judgment. Regarding Sims's unconstitutional search claim (the only claim at issue here), the district court granted Stanton qualified immunity, holding that the unconstitutionality of Stanton's conduct was not clearly established. *Id.* at 62. The Ninth Circuit reversed, holding that given all the circumstances — chiefly, the minor nature of the offense

for which Stanton had pursued Patrick, but also the fact that a third party's constitutional rights were implicated, and the possibility that Stanton could have knocked on the gate and asked to speak with Patrick — the pursuit did not qualify as an exigency justifying a warrantless entry into the curtilage of Sims's home. *Id.* at 10-11 & n.4, 14-15. In the court of appeals, Sims also argued that Stanton's entry was unjustified because he lacked probable cause to believe Patrick had committed a crime, but the court of appeals found it unnecessary to reach that question because it found no exigency. *Id.* at 14 n.5. Citing both this Court's and its own case law on exigency and curtilage, the court of appeals held that the relevant law was clearly established and therefore reversed the grant of qualified immunity. *Id.* at 20-23.

REASONS FOR DENYING THE WRIT

I. The Decision Below Does Not Implicate A Split Of Authority Regarding The Standard For Evaluating Exigent Circumstances.

The decision below applied the totality-of-the-circumstances test prescribed by this Court, and consistently applied by lower courts, to the question whether exigent circumstances existed. This Court has repeatedly instructed that "'the fact-specific nature of the reasonableness inquiry,' demands that we evaluate each case of alleged exigency based 'on its own facts and circumstances.'" *Missouri v. McNeely*, 133 S. Ct. 1552, 1559 (2013) (quoting, respectively, *Ohio v. Robinette*, 519 U.S. 33, 39 (1996), and *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931)); *see, e.g., Brigham City v. Stuart*, 547 U.S. 398, 406 (2006); *Illinois v. McArthur*, 531

U.S. 326, 331 (2001); *Cupp v. Murphy*, 412 U.S. 291, 296 (1973). One fact relevant to this exigent-circumstances inquiry is whether the officer is engaged in a "hot pursuit": in *United States v. Santana*, 427 U.S. 38 (1976), the Court applied the exigent-circumstances exception where police pursued a drug dealer into her house to arrest her. *See id.* at 40-43. The Court has also "h[e]ld that an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made." *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984). In *Welsh*, the Court refused to apply the exigent-circumstances exception because the police were investigating a traffic offense; the Court explained that "application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in this case, has been committed." *Id.*

Applying this body of law, as well as its own prior decision in *United States v. Johnson*, 256 F.3d 895 (9th Cir. 2001) (en banc), the court of appeals considered "whether the circumstances justified the warrantless entry." Pet. App. 12. The court correctly held that Stanton's pursuit of Patrick for failing to stop for an officer's order did not give rise to exigent circumstances justifying intrusion into the curtilage of a third party's home where Stanton could have knocked and asked to speak to Patrick. *Id.* at 14-15.

A. Petitioner claims that lower courts applying *Santana* and *Welsh* have created a confused body of case law applying the exigent-circumstances exception. In support of this claim, Petitioner marshals cases applying the exception in particular "hot pursuit" situations involving various non-felony offenses. *See* Pet. 20-30. But Petitioner's narrow focus on "hot pursuit" misses the forest for the trees: as Petitioner's authorities themselves reflect, courts evaluate exigency, as this Court has instructed, based on *all* the circumstances, not just the legal classification of the crime for which the suspect is being pursued. *See, e.g., State v. Alvarez*, 31 So. 3d 1022, 1024 (La. 2010) (permitting warrantless entry because "[a]lthough the crime of carrying a concealed weapon is a misdemeanor and not a felony, it is a jailable offense and one involving risk to public safety"); *LaHaye v. State*, 1 S.W.3d 149, 151-152 (Tex. Ct. App. 1999) (permitting warrantless entry where suspect was wanted for traffic violations and evading arrest but owner of apartment to which suspect fled consented to officer's entry).

That the exigency inquiry looks to the totality of the circumstances is a point of consensus, not conflict, among the cases Petitioner characterizes as in disagreement with each other. *See, e.g., State v. Bell*, 28 So. 3d 502, 508-09 (La. Ct. App. 2009) (finding exigent circumstances after considering "the circumstances of the case at bar" and noting other totality-of-circumstances evaluations of exigency by Louisiana courts); *State v. Ricci*, 739 A.2d 404, 406 (N.H. 1999) (finding exigent circumstances, and explaining that "[w]hether exigent circumstances exist is judged

on the totality of the circumstances"); *State v. Bolte*, 560 A.2d 644, 654 (N.J. 1989) (finding no exigent circumstances, and explaining that "the question whether hot pursuit by police justifies a warrantless entry depends on the attendant circumstances"); *State v. Bessette*, 21 P.3d 318, 320-21 (Wash. Ct. App. 2001) (finding no exigent circumstances after analyzing six factual factors).

Thus, the supposed conflict Petitioner reads into the cases he cites is nothing more than the repeated application of a fact-intensive standard under which difference circumstances produce different outcomes. *Compare United States v. Johnson*, 106 F. App'x 363, 367 (6th Cir. 2004) (permitting warrantless entry where suspect was armed), *Gasset v. State*, 490 So. 2d 97, 98-99 (Fla. Ct. App. 1986) (permitting warrantless entry where suspect had "jeopardized his own safety, the safety of the officers, and that of the general public" by leading officers on a high-speed chase at speeds up to eighty miles an hour through a residential area), *and State v. Ramirez*, 814 P.2d 1131, 1135 (Utah Ct. App. 1991) (permitting warrantless entry where "the circumstances of the repeated backup call and [the officer's] arrival while a chase was in progress provided reasonable justification for Officer Rowley to infer that appellant had committed a serious crime"), *with Mascorro v. Billings*, 656 F.3d 1198, 1207 (10th Cir. 2011) (finding no exigency because "the intended arrest was for a traffic misdemeanor committed by a minor, with whom the officer was well acquainted, who had fled into his family home from which there

was only one exit" and because there was no risk of destruction of evidence or public safety concerns).

Quoting snippets from this large body of jurisprudence, Petitioner suggests that certain jurisdictions apply conflicting per se rules regarding "hot pursuit." But these jurisdictions' more recent appellate cases demonstrate that no such conflict exists, as the cases apply the consensus totality-of-the-circumstances approach and make clear that exigency does not depend on the nature of the crime alone. For example, Petitioner cites a Virginia trial court decision for the proposition that, in that jurisdiction, the hot pursuit exception "applies only to . . . fleeing felons," Pet. 28 (citing *Commonwealth v. Curry*, 26 Va. Cir. 179 (Va. Cir. Ct. 1992)), and Petitioner contrasts that position with the statement in *Lepard v. State*, 542 N.E.2d 1347, 1350 (Ind. Ct. App. 1989), that "fleeing . . . a police officer creates an exigent circumstance." Pet. 23. Neither statement is representative of the case law in Virginia or Indiana. The Virginia Supreme Court has explained that "[t]he test for whether exigent circumstances were present is fact-specific," *Robinson v. Com.*, 639 S.E.2d 217, 226 (Va. 2007) (citation and internal quotation marks omitted), and has enumerated ten factors, of which seriousness of the crime is only one, to assess exigency. *See id.* And recent Indiana appellate decisions have repeatedly recognized that "[t]he validity of a warrantless arrest is determined by the facts and circumstances of each case." *McDermott v. State*, 877 N.E.2d 467, 473-74 (Ind. Ct.

App. 2007) (quoting *State v. Straub*, 749 N.E.2d 593, 598 (Ind. Ct. App. 2001); internal quotation marks omitted).

The Petition emphasizes two older cases from California's intermediate appellate court that could be read to permit arrest in any instance of "hot pursuit." *See* Pet. 21 (citing *People v. Lloyd*, 265 Cal. Rptr. 422, 424-25 (Cal. Ct. App. 1989), and *In re Lavoyne M.*, 270 Cal. Rptr. 394, 395-96 (Cal. Ct. App. 1990)); Pet. 35 (citing the same cases). The Supreme Court of California, however, has more recently explained that exigency is assessed based on the totality of the circumstances. *See People v. Thompson*, 135 P.3d 3, 13 (Cal. 2006) ("taking into account all of the circumstances" in determining that a warrantless home entry to arrest a DUI suspect was reasonable). The California high court noted a split of authority regarding a question not presented here — whether *Welsh* created "a bright-line rule limiting warrantless entries to felonies," *id.* at 11 — and the California court adopted the majority view rejecting such a rule. *See id.* at 10-11. At the same time, the court declined to impose a per se rule of the *opposite* kind, either:

> In holding that exigent circumstances justified the warrantless entry here, we need not decide — and do not hold — that the police may enter a home without a warrant to effect an arrest of a DUI suspect in *every* case. We hold merely that the police conduct here, taking into account all of the circumstances, was reasonable — with reasonableness measured as a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.

Id. at 13 (citation and internal quotation marks omitted, emphasis in original). Like the California Supreme Court, the court of appeals here embraced neither a per se

rule *against* finding exigency in cases of "hot pursuit" where the suspect is sought for a minor crime, nor a per se rule that "hot pursuit" *always* constitutes an exigent circumstance; rather, the court of appeals applied the same totality-of-the-circumstances standard that this Court has prescribed and lower courts consistently apply. *See* Pet. App. 14-15.

Petitioner cites various exigency cases in which courts have granted qualified immunity, Pet. 29-30, but cases do not conflict simply because they reach different conclusions on different facts. Thus, although Petitioner expresses surprise that a single federal court of appeals could, in the same year, grant qualified immunity in one case involving a warrantless entry and deny qualified immunity in another, *see* Pet. 25-26, these results follow easily from the fact-specific nature of the totality-of-the-circumstances inquiry. *Compare Mascorro*, 656 F.3d at 1207 (finding no exigency because "the intended arrest was for a traffic misdemeanor committed by a minor, with whom the officer was well acquainted, who had fled into his family home from which there was only one exit" and because there was no risk of destruction of evidence or public safety concerns), *with Aragon v. City of Albuquerque*, 423 F. App'x 790, 794 (10th Cir. 2011) (suspect had "threatened an officer" and then retreated into his home, so a reasonable officer could conclude he intended to arm himself).

Petitioner also cites several cases that pre-date this Court's 1984 decision in *Welsh*, *see* Pet. 24 & n.9 (citing District of Columbia, Nebraska, and Oregon cases

from 1976, 1978, and 1980, respectively). Obviously, these demonstrate nothing about the state of exigency law as it has developed since *Welsh*.

Ultimately, Petitioner, in the guise of asking the Court to sort out a conflict regarding the exigent-circumstances standard, is asking this Court to develop a new rule that "hot pursuit" for *any* crime creates an exigent circumstance no matter what the surrounding circumstances. But in this field, the Court has wisely refrained from imposing per se rules, which fail to account for the diversity of circumstances faced by law enforcement. Additionally, per se rules would create under- and over-generalizations too rigid to encapsulate the fact-intensive nature of the underlying Fourth Amendment "reasonableness" standard that the exigent-circumstances exception implements. *See McNeely*, 133 S. Ct. at 1561 (refusing to "depart from careful case-by-case assessment of exigency and adopt [a] categorical rule" and noting "the 'considerable overgeneralization' that a per se rule would reflect" (quoting *Richards v. Wisconsin*, 520 U.S. 385, 393 (1997)); *see also id.* at 1564 (plurality opinion) ("Numerous police actions are judged based on fact-intensive, totality of the circumstances analyses rather than according to categorical rules, including in situations that are more likely to require police officers to make difficult split-second judgments.").

B. The court of appeals correctly applied the totality-of-the-circumstances test to reject the defense of qualified immunity. The court of appeals had previously explained, in an en banc decision, that the minor nature of the offense for which a

suspect is pursued "weighs heavily against" finding exigency, and that the need to "encroach[] on the property of a person who did not create the exigent circumstances and was completely unrelated to the suspect and his misdemeanors" further diminishes the reasonableness of a warrantless entry. *Johnson*, 256 F.3d at 908-09 & n.6. Petitioner attempts to distinguish *Johnson* as not involving a "hot pursuit" because the pursuit was not "immediate" and "continuous," *see* Pet. 34, but the exigency analysis in *Johnson* did not end with the question of "hot pursuit." Instead, as this Court's exigent-circumstances jurisprudence instructs, the court of appeals went on to consider the other circumstances of the case, including the seriousness of the offense and the involvement of a third party (which are the main factors that led to the decision below). The court of appeals in *Johnson* considered these circumstances not in the abstract, but as they applied to Johnson's case. *See* 256 F.3d at 908 (explaining that the minor nature of the offense allegedly committed by the suspect whom the officers sought on Johnson's property "weighs heavily against" a finding of exigent circumstances); *id.* at 909 ("Johnson's lack of involvement in the situation that created the exigency is another factor weighing against the reasonableness of the warrantless entry.").

As in Petitioner's attempt to discern a circuit split, Petitioner misreads the case law by focusing exclusively on the question of "hot pursuit" rather than the entire exigency analysis, which looks to the totality of the circumstances. The Ninth Circuit's consideration of the seriousness of the offense and of the appropriateness

of an intrusion onto a third party's property was part of its exigency analysis in *Johnson* and therefore established the legal principles that should have informed Stanton that no exigent circumstances justified a warrantless intrusion here.

II. This Court's Case Law Clearly Establishes That Sims's Private Fenced-In Front Yard Was Curtilage.

Petitioner does not argue that the court of appeals was incorrect to hold that Sims's enclosed front yard was curtilage, or that there is a split of authority on the issue. Rather, Petitioner argues only that the law was insufficiently clear to overcome qualified immunity. *See* Pet. 37-40.

In this regard, Petitioner attacks the lower court's reliance on *Oliver v. United States*, 466 U.S. 170 (1984), *see* Pet. 39, but Petitioner does not even mention *United States v. Dunn*, 480 U.S. 294 (1987), upon which the court of appeals also relied. *See* Pet. App. 10-11 & n.4. It is unnecessary to debate the significance of *Oliver*, because *Dunn* is sufficient to resolve the case, as the court of appeals recognized. *Id.* at 11 n.4 ("Of course, applying the *Dunn* factors to Sims's yard leads to the same result.").

In *Dunn*, this Court instructed that

> curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

480 U.S. at 301.

Dunn easily answers the question whether Sims' fenced-in front yard was curtilage, given the proximity of the yard to the home, the enclosed nature of the yard, the high degree of privacy that Sims enjoys there, and the six-foot-high fence erected to maintain privacy in the yard. Pet. App. 11 n.4. *Dunn* was decided more than twenty years before Stanton's warrantless intrusion, and its factors so clearly indicate that Sims's yard is curtilage that Stanton should have been on notice that his warrantless entry required probable cause and exigent circumstances. *See generally Hope v. Pelzer*, 536 U.S. 730, 739-41 (2002) (rejecting requirement that a case decided on "materially similar" facts must exist for law to be "clearly established").

Petitioner attempts to muddy the waters by citing cases discussing a police officer's entitlement to approach a home in the manner customarily available to any member of the public. *See* Pet. 37-38. These cases have no application here, because no member of the public would think that a permissible way to visit Sims would be to kick in her gate. For instance, Petitioner cites *United States v. Roberts*, 747 F.2d 537 (9th Cir. 1984), for the proposition that "anyone may openly and peaceably walk up the steps and knock on the front door of any man's castle," Pet. 37 (citation, internal quotation marks, and Petitioner's alteration marks omitted), but the adverb "peaceably" easily distinguishes that case from this one, in which Stanton entered Sims's yard violently enough to send her to the hospital. In fact, one of the reasons the court of appeals held Stanton's actions to be unreasonable under the

Fourth Amendment is that he could have (as *Roberts* put it) "peaceably . . . knock[ed]," but he chose not to do so. *See* Pet. App. 15.

The court of appeals was correct to reject Stanton's argument that Sims's yard was not curtilage under clearly established law.

III. The Answer To the Questions Presented Will Not Affect The Outcome Of This Case Because Petitioner Lacked Probable Cause.

This case is a poor vehicle to consider Petitioner's argument for a new per se rule governing exigent circumstances because such a rule would not change the outcome in this case. The exigency exception to the warrant requirement depends on both probable cause and exigent circumstances, and the absence of either one dooms a warrantless home intrusion under the Fourth Amendment. *See, e.g., Kirk v. Louisiana*, 536 U.S. 635, 638 (2002) (per curiam) (citing *Payton v. New York*, 445 U.S. 573 (1980)). Here, not only was the intrusion unjustified by exigent circumstances, but Stanton also lacked probable cause to believe that Nicholas Patrick had committed a crime.

The only crime Petitioner has identified as a basis for a finding of probable cause is a violation of California Penal Code § 148, which criminalizes "willfully resist[ing], delay[ing], or obstruct[ing] any public officer . . . in the discharge or attempt to discharge any duty of his or her office or employment."* The California

* Although the existence of probable cause does not depend on the particular crime the officer subjectively believed he was investigating, *see Devenpeck v. Alford*, 543 U.S. 146, 153 (2004), the fact that Petitioner limited his probable cause argument to § 148 in the court of appeals narrows the probable cause inquiry before this Court, because arguments not raised below are waived.

courts have held that this provision applies to the failure to submit to a detention only where the detention is itself lawful and the subject is aware that the officer is attempting to detain him. *See People v. Allen*, 167 Cal. Rptr. 502, 505-06 (Cal. Ct. App. 1980); *see also People v. Ramirez*, 44 Cal. Rptr. 3d 813, 816 (Cal. Ct. App. 2006) ("*Allen* . . . permits detention when a *lawfully* stopped suspect attempts to flee, thus delaying performance of the officer's 'official duty.'" (citation omitted; emphasis in original)).

Here, as Respondent argued below, *see* Pet. App. 14 n.5 (acknowledging that the parties "fiercely debated" the issue, but finding it unnecessary to resolve), Stanton lacked probable cause to believe that Patrick had violated Penal Code § 148, for two reasons. First, the alleged initial attempt to detain Patrick was unlawful. "[A]n investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful[.]" *In re Tony C.*, 582 P.2d 957, 959 (Cal. 1978) (citing *Terry v. Ohio*, 392 U.S. 1, 22 (1968)), *corrected*, 697 P.2d 311 (Cal. 1985). When Stanton allegedly ordered Patrick to stop, Stanton was investigating a disturbance involving a baseball bat. Patrick did not have a bat or any other weapon and engaged in no conduct that suggested any connection to the reported disturbance. Pet. App. at 6-7. Stanton had no reason to suspect Patrick of any criminal activity, let alone involvement in a disturbance involving a baseball bat. Stanton thus lacked reasonable suspicion to detain Patrick. *See generally Ybarra v. Illinois*, 444 U.S. 85, 91-94, 96 n.10 (1979) (finding no reasonable suspicion for *Terry* frisk of patron in a

bar where police had a warrant to search the bar itself and evidence of drug activity implicating the bartender, but no evidence that patron himself posed any danger; the Court noted that "[t]he circumstances of this case do not remotely approach those in which the Court has said that a search may be made on less than probable cause"); *see, e.g., Romero v. Story*, 672 F.3d 880, 886, 888 (10th Cir. 2012) (no reasonable suspicion where police knew only that suspect was present in location where vandalism had been reported and was the same race as the alleged vandal); *United States v. Jaramillo*, 25 F.3d 1146, 1147-49, 1152 (2d Cir. 1994) (rejecting *Terry* frisk of patron of bar based on the fact that two *other* patrons had exchanged a gun when the officers arrived at the bar, because *Terry* does not authority officers to frisk "a person in a public place where the officers have no specific and articulable facts on which to base a suspicion of that person in particular"); *Tony C.*, 582 P.2d at 961-63 (two black males' presence in an area where robberies by three black males had been reported did not justify *Terry* stop).

Second, there is a dispute of fact regarding whether Stanton in fact instructed Patrick to stop. *See* Appellant's Opening Br., *Sims v. Stanton*, No. 11-55401, at 5-6, 10 (9th Cir. filed Aug. 17, 2011) (noting disputes of fact, including whether Stanton called for Patrick to stop); Appellant's Reply Br., *Sims*, at 5 (9th Cir. filed Oct. 17, 2011) (noting divergence of Petitioner's and Respondent's accounts). Stanton claims that he ordered Patrick to stop. Pet. App. 7. But Sims,

who was standing behind her gate, testified at deposition that she did not hear any such order. 9th Cir. Excerpts of Record 11, 24-26 (Sims Dep. at 125; Sims Decl.).

Because, as a matter of California law, a violation of Penal Code § 148 requires both a lawful detention order and the subject's knowledge of the attempt to detain him, and these elements are either lacking (the lawful order) or in doubt (knowledge), Stanton cannot establish that he had probable cause to believe a crime had been committed when he kicked open Drendolyn Sims's gate and seriously injured her. Therefore, even if Stanton could demonstrate exigency, he would still have violated Sims's clearly established Fourth Amendment rights because he lacked probable cause for his warrantless intrusion.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

L. MARCEL STEWART
LAW OFFICE OF L. MARCEL STEWART
2534 State Street, Suite 423
San Diego, CA 92101
(619) 702-4123

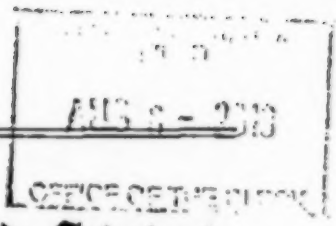
SCOTT MICHELMAN
Counsel of Record
ADINA H. ROSENBAUM
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
smichelman@citizen.org

Counsel for Respondent Drendolyn Sims

July 2013

REPLY BRIEF

No. 12-1217



In The
Supreme Court of the United States

MIKE STANTON,

Petitioner,

vs.

DRENDOLYN SIMS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

TIMOTHY T. COATES
Counsel of Record
LILLIE HSU
GREINES, MARTIN, STEIN & RICHLAND LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261
E-Mail: tcoates@gmsr.com

PETER J. FERGUSON
FERGUSON, PRAET & SHERMAN
1631 East 18th Street
Santa Ana, California 92705-7101
Telephone: (714) 953-5300
Facsimile: (714) 953-1143

Counsel for Petitioner
Mike Stanton

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 2

I. THERE IS A CLEAR CONFLICT AMONG STATE AND FEDERAL COURTS CONCERNING WHETHER "HOT PURSUIT" INDEPENDENTLY JUSTIFIES A WARRANTLESS HOME ENTRY TO ARREST FOR A MISDEMEANOR 2

II. REVIEW IS NECESSARY TO BRING THE NINTH CIRCUIT INTO COMPLIANCE WITH THIS COURT'S PRECEDENTS CONCERNING APPLICATION OF QUALIFIED IMMUNITY AND TO RESOLVE THE CONFLICT AMONG APPELLATE COURTS REGARDING APPLICATION OF QUALIFIED IMMUNITY WHERE OFFICERS ENTER A RESIDENCE IN HOT PURSUIT OF A FLEEING MISDEMEANANT 8

III. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE CONFLICT CONCERNING APPLICATION OF THE *SANTANA* HOT-PURSUIT RULE TO MISDEMEANORS, AND APPLICATION OF QUALIFIED IMMUNITY IN THE CONTEXT OF HOT PURSUIT TO ARREST FOR A MISDEMEANOR 11

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987).....9

Ashcroft v. al-Kidd, 131 S. Ct. 2074 (2011).....9

Farmer v. Brennan, 511 U.S. 825 (1994).....12

LaHaye v. State, 1 S.W.3d 149 (Tex.Ct.App. 2000).....5

Missouri v. McNeely, 133 S. Ct. 1552 (2013).....6

People v. Thompson, 135 P.3d 3 (Cal. 2006).....6, 7

People v. Thompson, 270 Cal.Rptr. 863 (Cal.Ct.App. 1990).....10

State v. Bell, 28 So.3d 502 (La.Ct.App. 2009).....5

State v. Ramirez, 814 P.2d 1131 (Utah Ct.App. 1991).....6

State v. Ricci, 739 A.2d 404 (N.H. 1999).....5

Terry v. Ohio, 392 U.S. 1 (1968).....13

United States v. Dunn, 480 U.S. 294 (1987).....10

United States v. Johnson, 256 F.3d 895 (9th Cir. 2001).....7

United States v. Santana, 427 U.S. 38 (1976) ....*passim*

Welsh v. Wisconsin, 466 U.S. 740 (1984).....*passim*

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution Eighth Amendment.....12

California Penal Code, §148.....12

INTRODUCTION

The Petition demonstrated that federal and state courts are sharply divided on whether "hot pursuit" of a fleeing suspect, in and of itself, justifies officers in entering a home without a warrant to arrest for a misdemeanor. The Brief in Opposition ("BOP") highlights the need for review. In denying that any split exists, respondent simply puts herself on one side of it and ignores the other.

Respondent argues that all cases involving exigent circumstances, including hot pursuit, should be analyzed based on the totality of the circumstances, with hot pursuit being simply one of many factors relevant to determining whether exigency justifies a warrantless entry. She ignores that numerous courts have found that factor to be dispositive, relying on this Court's decision in *United States v. Santana*, 427 U.S. 38 (1976), to hold that hot pursuit, by itself, justifies a warrantless home entry to arrest for a misdemeanor. She further ignores that numerous courts have applied qualified immunity in this scenario, expressly recognizing the law is unsettled.

Particularly telling, to make her point that all cases involving exigent circumstances – including hot pursuit – should be, and are being, analyzed based on the totality of the circumstances, she relies on cases that do *not* involve hot pursuit. This is exactly what the numerous courts on the other side of the split have done – interpreted *Welsh v. Wisconsin*, 466 U.S. 740 (1984), a case this Court expressly noted did not

involve hot pursuit, to establish a rule for cases that *do* involve hot pursuit.

There are certainly two sides to the question of whether the *Santana* hot-pursuit rule should apply to misdemeanors, but that is the point – courts across the country are manifestly divided on the issue. The result is confusion and needless litigation in the context of both civil rights suits and everyday suppression hearings. It is essential that the Court grant review to provide clarity on this important and recurring issue, and to once again compel the Ninth Circuit to adhere to this Court's precedents concerning application of qualified immunity.

ARGUMENT

I. THERE IS A CLEAR CONFLICT AMONG STATE AND FEDERAL COURTS CONCERNING WHETHER "HOT PURSUIT" INDEPENDENTLY JUSTIFIES A WARRANTLESS HOME ENTRY TO ARREST FOR A MISDEMEANOR.

The Petition established:

- In *Santana*, 427 U.S. at 42-43, this Court held that "hot pursuit" of a fleeing suspect – there, a felony suspect – in and of itself, justified officers in entering a home without a warrant to complete an arrest. Although the Court noted the presence of other exigencies, it did not rely on those exigencies to justify the entry. *Id.* at 43.

- In *Welsh,* 466 U.S. at 753, this Court held a warrantless home entry to arrest for a minor, non-felony offense could not be justified absent "rare[ ]" exigent circumstances. But the Court expressly noted the case did not involve a "hot pursuit." *Id.* at 750, 753.

- Since *Welsh*, lower courts have divided on whether hot pursuit independently justifies a warrantless home entry to arrest for a misdemeanor. The Sixth Circuit, numerous district courts, and fourteen states have answered affirmatively, reasoning that *Santana*'s rationale – that a suspect may not thwart an arrest begun in public by fleeing to a residence – applies equally to misdemeanors, and *Welsh* did not involve a hot pursuit. (Pet. 20-24.) In contrast, the Ninth and Tenth Circuits, numerous district courts and seven states view hot pursuit as only one factor to consider in determining whether exigent circumstances justify a warrantless entry, and construe *Welsh* as holding that few, if any exigencies – including hot pursuit – would justify a warrantless home entry to arrest for a misdemeanor. (Pet. 25-28.)

- Three circuits, several district courts and one state appellate court have found officers entitled to qualified immunity for warrantless home entries based on hot pursuit of a fleeing misdemeanant, precisely because the law is unsettled. (Pet. 28-30.) A scholar also has noted the clear split on the issue. (Pet. 30.)

- Nonetheless, the Ninth and Tenth Circuits have denied qualified immunity in the same circumstances, finding the law clearly established. (Pet. 33-36.)

- Whether officers may enter a home without a warrant in hot pursuit of a misdemeanor suspect is an important, recurring issue that arises routinely in suppression hearings and civil rights suits nationwide, and directly affects law enforcement officers' daily decisions in arresting suspects.

Respondent fails to refute any of these points. She does not contest that *Santana*'s justification for the hot-pursuit doctrine applies equally to misdemeanor arrests. (*See* BOP5.) Nor does she dispute that in *Welsh*, this Court expressly noted it was not confronted with a hot-pursuit situation. (*See* BOP5.) Tellingly, respondent utterly ignores the numerous cases that have applied qualified immunity expressly because the law is unsettled. (*See* Pet. 28-31.) She does not deny that whether officers may enter a home without a warrant in hot pursuit of a fleeing misdemeanant, and whether they are entitled to qualified immunity for doing so, are critical issues for law enforcement.

Instead, respondent asserts that all cases involving exigent circumstances, including hot pursuit, must be evaluated based on the totality of the circumstances, and hot pursuit is simply one factor to be considered in determining whether exigency justifies a warrantless home entry. (BOP4-13.) In effect,

respondent simply places herself on one side of the split – siding with the Ninth and Tenth Circuits, several district courts and seven states that similarly have viewed hot pursuit as only one factor in the exigent-circumstances calculus and interpret *Welsh* as holding that any exigencies, including hot pursuit, will rarely justify a warrantless home entry to arrest for a misdemeanor. (Pet. 25-28.) But the fact remains that the Sixth Circuit, numerous district courts, and fourteen states have disagreed and held that under *Santana*, hot pursuit, alone, justifies such entry. (Pet. 20-24.) Taking sides does not make the split go away.

Respondent downplays the split by asserting that courts on both sides "evaluate exigency . . . based on *all* the circumstances," and that different facts explain the different outcomes. (BOP6-7, 10.) Although courts do generally examine all of the circumstances, courts on one side of the split view certain facts as dispositive – *i.e.*, whether officers are in hot pursuit of a suspect fleeing an arrest initiated in public. *See, e.g.*, *LaHaye v. State*, 1 S.W.3d 149, 152 (Tex.Ct.App. 2000) ("Exigent circumstances exist when the police are in hot pursuit of a suspect"); *State v. Bell*, 28 So.3d 502, 508, 510 (La.Ct.App. 2009) (misdemeanor suspect "may not, under *Santana*, elude capture for a valid arrest . . . set in motion in a public place by escaping to a private place"); *State v. Ricci*, 739 A.2d 404, 407-08 (N.H. 1999) (entry justified because "the totality of circumstances demonstrates that the police were in hot pursuit").

Moreover, even if the cases might reach the same results had they all applied respondent's straight totality-of-the-circumstances test, cases on the "hot pursuit" side of the split are not using that analysis. Rather, they conclude that under *Santana*, hot pursuit of a fleeing misdemeanant, itself, is an exigency – rather than treating hot pursuit as simply one among many factors to be considered in determining whether exigent circumstances justify a warrantless entry. *See, e.g.*, *State v. Ramirez*, 814 P.2d 1131, 1134 (Utah Ct.App. 1991) (exigent circumstances justified entry because officer was in "hot pursuit" of misdemeanor suspect; *Welsh* "did not involve a hot pursuit").

Respondent also argues that this Court's decisions require that any case of alleged exigency – including hot pursuit – be evaluated based on the totality of the circumstances, and that this Court has eschewed per se rules. (BOP4-5, 11.) But none of the cases she cites involves hot pursuit. Moreover, in one of the cases she cites, *Missouri v. McNeely*, 133 S. Ct. 1552, 1570 (2013), the Court cites *Santana* as one of the cases where "the requirement that we base our decision on the 'totality of the circumstances' has not prevented us from spelling out a general rule for the police to follow."

Similarly, respondent cites *People v. Thompson*, 135 P.3d 3 (Cal. 2006), as establishing that petitioner's state has adopted a totality-of-the-circumstances test for exigent circumstances, including hot pursuit (BOP9) – but *Thompson* did not involve a hot pursuit. Its facts are virtually identical to *Welsh*: a citizen

observed defendant's drunk driving and notified police; officers went to defendant's home, found his car parked outside, and entered the home to arrest defendant. *Id.* at 5-6. The California Supreme Court held that the metabolization of alcohol constituted imminent destruction of evidence justifying the warrantless entry, and distinguished *Welsh* on the grounds that California, unlike the state in *Welsh*, classified drunk driving as a jailable offense. *Id.* at 8-9, 11-13. The court noted the hot-pursuit doctrine was inapplicable because the pursuit had not been continuous. *Id.* at 13-14.

Finally, respondent argues the Ninth Circuit correctly applied a totality-of-the-circumstances test to deny qualified immunity based on its prior en banc decision in *United States v. Johnson*, 256 F.3d 895 (9th Cir. 2001). (BOP11-12.) Yet, *Johnson* expressly found the hot-pursuit doctrine inapplicable because the officers' pursuit was not "'immediate' and 'continuous.'" *Id.* at 907-08. Respondent notes the court nonetheless considered whether exigent circumstances justified a warrantless home entry given the case's other facts. (BOP12.) She misses the point. Because *Johnson* did not involve hot pursuit, it could not, and did not, clearly establish that hot pursuit of a misdemeanant cannot justify a warrantless home entry without additional exigent circumstances. Tellingly, respondent ignores that post-*Johnson*, district courts within the Ninth Circuit granted qualified immunity to officers for warrantless entries in hot pursuit to

arrest for misdemeanors, *because the law was unsettled*. (*See* Pet. 35 & n.15.)

State and federal trial and appellate courts are sharply divided on whether the hot-pursuit doctrine of *Santana* applies to misdemeanors. Until this conflict is resolved, officers cannot know under what circumstances they may enter a home without a warrant to arrest a fleeing misdemeanant, whether they face civil liability for doing so, or what impact their conduct will have on any subsequent criminal proceeding. Yet officers across the country must make these split-second decisions on a daily basis. And trial courts, confronted with civil rights suits and ubiquitous suppression hearings, need clear guidelines to ensure consistent application of the law and avoid wasting scarce resources in unnecessary litigation. It is vital that this Court grant review.

II. REVIEW IS NECESSARY TO BRING THE NINTH CIRCUIT INTO COMPLIANCE WITH THIS COURT'S PRECEDENTS CONCERNING APPLICATION OF QUALIFIED IMMUNITY AND TO RESOLVE THE CONFLICT AMONG APPELLATE COURTS REGARDING APPLICATION OF QUALIFIED IMMUNITY WHERE OFFICERS ENTER A RESIDENCE IN HOT PURSUIT OF A FLEEING MISDEMEANANT.

If there was ever a case where qualified immunity based on the absence of clearly established law is warranted, it is this one. State and federal courts are divided on the basic issue of whether hot pursuit of a

misdemeanant justifies a warrantless entry into a home. None of the case law cited by the Ninth Circuit or respondent comes close to meeting this Court's standard in *Anderson v. Creighton*, 483 U.S. 635 (1987) that "[t]he contours of [a] right must be sufficiently clear that a reasonable [officer] would understand that what he is doing violates that right." *Id.* at 640. It certainly cannot be said that "existing precedent" has placed the "constitutional question beyond debate." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011).

The Ninth Circuit's disregard of this Court's precedents in applying qualified immunity in the context of police officer liability for a warrantless entry made in hot pursuit of a misdemeanant is echoed in the Tenth Circuit, which has similarly rejected qualified immunity under such circumstances – a particularly puzzling result since, as noted, only three months earlier a Tenth Circuit panel had, in an unpublished disposition, applied qualified immunity in this context because the law was not "clearly established." (*See* Pet. 25-26 & n.10, 36.) In contrast, three circuits and one state appellate court have found officers entitled to qualified immunity for warrantless home arrests based on hot pursuit where the underlying offense was a misdemeanor, recognizing that the law is unsettled. (Pet. 29-30.)

Respondent utterly ignores this express conflict concerning application of qualified immunity to warrantless entries made in hot pursuit of a misdemeanant.

Instead, respondent contends that the law governing whether her front yard was curtilage was clearly established, citing *United States v. Dunn*, 480 U.S. 294 (1987). (BOP13-14.) This is irrelevant. Even assuming respondent's front yard was curtilage and equivalent to the home itself, if, under *Santana*, petitioner could lawfully enter without a warrant in hot pursuit of a misdemeanant (or given the conflict in the law could reasonably believe he could do so), respondent does not have a valid claim.

Respondent also contends that it was clearly established that petitioner could not enter Sims' front yard by kicking open the gate (BOP14-15), but conspicuously cites no case finding this manner of entry unconstitutional given the circumstances here. And, as noted, a California appellate court has held that an officer could properly hop a fence into a backyard in curtilage to detain a suspect for trespassing. (Pet. 38, discussing *People v. Thompson*, 270 Cal.Rptr. 863, 873-75 (Cal.Ct.App. 1990).)

There is a plain conflict among state and federal appellate courts concerning application of qualified immunity to warrantless entries made in hot pursuit to arrest for a misdemeanor. The conflict is clear, ongoing, and impacts day-to-day operations of police officers throughout the country. Review is warranted.

III. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE CONFLICT CONCERNING APPLICATION OF THE *SANTANA* HOT-PURSUIT RULE TO MISDEMEANORS, AND APPLICATION OF QUALIFIED IMMUNITY IN THE CONTEXT OF HOT PURSUIT TO ARREST FOR A MISDEMEANOR.

Respondent asserts that even if a conflict exists concerning application of the hot-pursuit doctrine to misdemeanors, nonetheless the Court should deny review because the case is allegedly a poor vehicle to decide the issues given what respondent contends are underlying factual questions that would ultimately defeat qualified immunity. (BOP15.) Not so.

According to respondent, even if the Court determines that the *Santana* hot-pursuit rule applies to fleeing misdemeanants or that a reasonable officer could believe it applied, nonetheless petitioner would not be entitled to qualified immunity because there are issues of fact concerning whether he had probable cause to arrest the suspect for a misdemeanor at all. Specifically, respondent asserts that there are alleged factual issues regarding whether the suspect was aware he was being chased or whether the officer could even ask the suspect to stop in the first instance. (BOP15-17.)

As a threshold matter, this Court has not hesitated to grant review to resolve clear conflicts or provide clarification concerning important principles of law, and then remand for the lower courts to apply

the correct standards. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 832, 848-49 (1994) (review granted to resolve inconsistent application of "deliberate indifference" standard in Eighth Amendment cases; case remanded for lower court to apply correct standard). Here, the Ninth Circuit has outright denied qualified immunity, finding it somehow clearly established that the hot-pursuit doctrine does not apply to misdemeanors. Thus, petitioner's defense of qualified immunity has been voided *ab initio* without regard to any purported issues of fact, based upon a wantonly untenable construction of the law. There is nothing abstract about petitioner's right to have his entitlement to qualified immunity determined under the correct legal standards.

But, in any event, there is no factual dispute and it is not surprising that the Ninth Circuit did not rely on any alleged factual issues in rejecting petitioner's qualified immunity claim. As the district court found, respondent did not introduce competent evidence to create an issue of material fact in opposition to the motion for summary judgment. Respondent's factual "issue" with respect to probable cause to arrest for California Penal Code section 148 is that the suspect allegedly did not hear the officer's command, a contention based solely upon petitioner's own testimony that from where she was standing she did not hear the officer's command. (BOP17-18; App.7; ER11, 24-25.) Yet, the district court expressly found that respondent's testimony was a sham and incapable of creating a genuine issue of material fact because it

contained glaring contradictions as to where she was at what time and therefore whether she could have heard anything the officer said. (*See* App.62-66; *see* ER11, 20-21.) The district court also found that in any event, even if respondent did not hear the officer's command, that says nothing about whether the suspect heard it, and, significantly, respondent offered no testimony from the suspect concerning his interaction with petitioner. (App.66-67 n.4.)

It is similarly understandable why the Ninth Circuit paid no heed to respondent's contention that petitioner lacked articulable suspicion to conduct an investigatory stop under *Terry v. Ohio*, 392 U.S. 1 (1968) in the first place. Petitioner responded to a call at 1:00 a.m. reporting a fight involving a baseball bat in an area known for armed gang violence, and observed three men at the fight scene quickly disperse upon seeing the officers arrive. (Pet. 3.) To assert that an officer could not even attempt to question any of these individuals, let alone reasonably believe he might be able to do so under *Terry* for purposes of qualified immunity, is flatly untenable.

The Ninth Circuit resolved, and this case squarely presents, an issue that is of ongoing importance to law enforcement officials and court systems throughout the country – whether the hot-pursuit doctrine of *Santana* applies to warrantless home entries to arrest for a misdemeanor. There is no justification to further delay resolution of this important issue, and failure to clarify the law will resign state and federal court systems to continued litigation in the context of

civil suits and suppression hearings. Review should be granted.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

TIMOTHY T. COATES
Counsel of Record
LILLIE HSU
GREINES, MARTIN, STEIN & RICHLAND LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261

PETER J. FERGUSON
FERGUSON, PRAET & SHERMAN
1631 East 18th Street
Santa Ana, California 92705-7101
Telephone: (714) 953-5300
Facsimile: (714) 953-1143

Counsel for Petitioner Mike Stanton